Supreme Court, U.S.
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In The

Supreme Court of the United States

WELTMAN, WEINBERG & REIS CO., L.P.A.,

Petitioner,

v.

ROBERT TODD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Subsequent to the conclusion of state court garnishment proceedings, does a federal district court have jurisdiction to: (i) order funds previously garnished by a state court to be returned to the state court judgment debtor; (ii) declare that an affidavit submitted in support of an application for garnishment to a state court was insufficient and in violation of the law, even though the state court previously found the affidavit to be "satisfactory" and issued the garnishment order as a result; and (iii) award damages for injuries allegedly caused by the state court garnishment?

2. Does the absolute witness immunity bar a federal civil action brought by a judgment debtor against a judgment creditor's attorney based on the attorney's filing of an allegedly false affidavit in support of state court garnishment proceedings to enforce a valid underlying judgment?

PARTIES TO THE PROCEEDINGS BELOW

A list of all parties to the proceedings in the court whose judgment is the subject of this Petition is as follows:

Petitioner: Weltman, Weinberg & Reis Co., L.P.A.

Respondent: Robert Todd

RULE 29.6 STATEMENT

Petitioner, Weltman, Weinberg & Reis Co., L.P.A., is an Ohio legal professional association and has no parent corporation. There is no publicly held company with 10% or greater ownership interest in Weltman, Weinberg & Reis Co., L.P.A.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 434 F.3d 432 and is reproduced at App. 1-29. The order of the court of appeals denying Petitioner's petition for rehearing and for rehearing *en banc* is unreported and is reproduced at App. 30-50. The opinion of the district court is unreported and is reproduced at App. 51-52.

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on January 13, 2006. The court of appeals denied Petitioner's timely petition for rehearing and for rehearing *en banc* on April 24, 2006. This Petition is timely pursuant to 28 U.S.C. § 2101 and Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Relevant statutory provisions include 28 U.S.C. § 1257 (reproduced at App. 53), portions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* (reproduced at App. 53-61), and Ohio Rev. Code §§ 2715.11 (eff. 10-1-53) (reproduced at App. 62), 2716.11 (reproduced at App. 62-63) and 2716.13 (reproduced at App. 63-75).

STATEMENT OF THE CASE

1. Procedural Background. The plaintiff below, Respondent herein, asserts jurisdiction pursuant to 28 U.S.C. § 1331 based on claims that the defendant violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"). Petitioner Weltman, Weinberg & Reis Co., L.P.A. moved for judgment on the pleadings, arguing, in part, that the district court did not have jurisdiction over the plaintiff's claims and, in any event, that the claims are barred by absolute witness immunity. The district court overruled that Motion and Petitioner appealed pursuant to the collateral order doctrine and 28 U.S.C. § 1291. The Sixth Circuit Court of Appeals affirmed the district court's decision.

2. Factual Background. The plaintiff defaulted on a loan. (Plaintiffs' Amended Complaint, ¶ 18). Petitioner, a law firm, representing the creditor, obtained a judgment for the balance due on the loan from an Ohio state court. (*Id.*)

After obtaining judgment, one of the Petitioner's attorneys prepared, signed and submitted a garnishment affidavit in support of an application to the Ohio state court to garnish the plaintiff's bank account (the "Affidavit"). (*Id.* at Exh. A).

The Affidavit contained mandatory Ohio Rev. Code § 2716.11 language:

> THE UNDERSIGNED BEING FIRST DULY CAUTIONED AND SWORN, OR AFFIRMED ACCORDING TO LAW, SAYS THAT I AM ATTORNEY/JUDGMENT CREDITOR HEREIN WHO HERETOFORE RECOVERED, OR CERTIFIED, A JUDGMENT AGAINST THE JUDGMENT DEBTOR NAMED ABOVE, THAT I HAVE GOOD REASON TO BELIEVE AND DO BELIEVE THAT THE GARNISHEE NAMED IN SECTION (A) BELOW HAS PROPERTY OTHER THAN PERSONAL

> EARNINGS OWING BY THEM TO SAID JUDGMENT DEBTOR THAT IS NOT EXEMPT UNDER THE LAWS OF THE STATE OF OHIO AND THE UNITED STATES * * *

(*Id.* at Exh. A). The portion of the Affidavit where assets are listed was left blank. (*Id.* at Exh. A and ¶ 27).

On January 28, 2003, the state court held that the Affidavit was satisfactory under Ohio law and entered a garnishment order:

> The judgment creditor in the above case has filed ***an affidavit satisfactory to this court*** stating that you have money, property, or credits other than personal earnings in your hands or under your control, that belong to the judgment debtor, and that ***some of the property***, or credits ***may not be exempt***. * * *

(*Id.* at ¶ 25; Defendants' Motion for Judgment on the Pleadings, Exh. 1, Ohio Docket (*bold emphasis added*)).

Pursuant to the Ohio garnishment order, the plaintiff's bank froze $495.28. (Plaintiffs' Amended Complaint, ¶ 29). Under Ohio Rev. Code § 2716.13, the plaintiff debtor had five days to request a garnishment hearing to prove to the Ohio court the exempt status of any of the funds. On February 12, 2003, the plaintiff requested a garnishment hearing. (Defendants' Motion for Judgment on the Pleadings, Exh. 1, Docket). On February 28, 2003, after a hearing, the Ohio court found the frozen funds to be exempt. (*Id.*; Plaintiffs' Amended Complaint, ¶ 30).

Subsequent to the state court proceedings, on March 7, 2003, the plaintiff filed this putative class action, alleging:

> (i) Petitioner did not conduct a debtor examination or conduct formal discovery before applying to the Ohio state court for garnishment;

(ii) Petitioner "left the section provided in the affidavit for the listing of non-exempt assets" blank; and

(iii) Petitioner "had no factual basis for a belief that Mr. Todd's account contained non-exempt assets."

(*Id.* at ¶¶ 26-28). Based on these alleged infirmities, the plaintiff asserts claims for violation of 15 U.S.C. § 1692e (prohibiting the use of a false representation in the collection of a debt) and 15 U.S.C. § 1692f (prohibiting the use of unfair or unconscionable means to collect a debt). (*Id.* at ¶¶ 54-55). As remedies, the plaintiff seeks:

(i) a declaration that "Defendants' conduct violated the laws of the United States";

(ii) an order requiring "Defendants to return all confiscated sums and to pay compensatory and punitive damages to Plaintiffs and the Class Members, including damages for humiliation"[1]; and

(iii) attorneys fees and costs.

(*Id.* at 12).

3. The District Court Decision. Petitioner moved for judgment on the pleadings, asserting that the district court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine and the complaint is barred by the absolute witness immunity. The district court denied that Motion, holding that the *Rooker-Feldman* doctrine does not apply because the Ohio court did not "make any determination as to the factual accuracy of an affidavit submitted . . . prior to signing the . . . order" and "success by Plaintiffs on their claims would not undermine the

[1] While plaintiff's funds were returned after an exemption hearing, he nonetheless purports to represent a class of debtors, some of which proved that garnished funds were exempt at a hearing and some of which did not.

state court's findings that the affidavits were 'satisfactory' and that garnishment could proceed." Slip op. at 8, 9.

The district court also held that absolute witness immunity does not apply because the rationales supporting the immunity "do not support affording Defendants witness immunity for their alleged actions here." Slip op. at 13. Analyzing the *motives* of creditor's attorneys, as opposed to their function within judicial proceedings, the district court found "there is little fear that 'witnesses' such as Messrs. Rohner and Wiseman will fail to come forward to file affidavits in support of garnishment." *Id.* Instead, the district court views attorneys submitting affidavits as "fungible" "representatives." *Id.* at 13-14.

4. The Court of Appeals Decision. The court of appeals affirmed. The Sixth Circuit interpreted *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) as standing for the proposition that "even if the independent claim was inextricably linked to the state court decision, preclusion law [is] the correct solution to challenge the federal claim, not *Rooker-Feldman*." 434 F.3d at 437.

The Sixth Circuit, focusing on the motives and incentives of a creditor's attorney, held that an attorney filing an affidavit after obtaining valid judgment does not serve as an "'integral part[] of the judicial process,' such as judges, advocates, and witnesses in their ordinary judicial roles." *Id.* at 447. Believing that an attorney filing an affidavit in support of a garnishment to enforce a valid underlying judgment is a "complaining witness," the court held that Petitioner is not entitled to immunity. Instead, the court characterized counsel filing garnishment affidavits as "a self-interested party who allegedly lies in an affidavit to initiate a garnishment proceeding." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents two critical issues: (1) the scope of the jurisdiction of lower federal courts under the *Rooker-Feldman* doctrine after *Exxon* and (2) the scope of the absolute witness immunity. If permitted to stand, the Sixth Circuit's decision will allow federal district courts to overturn state court decisions, make a mockery of the state judicial system's application of its own statutes and shrivel the historic protections afforded to individuals participating in juridical proceedings. The Sixth Circuit's decision will impact: (i) the ability of creditors to obtain final decisions on garnishments; (ii) the ability of state courts to regulate conduct within their own proceedings free from interference and reversal by federal courts; and (iii) the ability of attorneys to fulfill their duties of faithful and zealous representation of their clients, free from the threat of collateral civil action brought by opposing parties.

The pendulum has swung too far, expanding the federal court interference of lower federal courts in state court proceedings. The Sixth Circuit's decision on a district court's ability to review and effectively reverse state court decisions contradicts this Court's holdings in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and misstates *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005). Moreover, there is a significant conflict among the circuit courts on how to apply the *Rooker-Feldman* doctrine post *Exxon*.

The Sixth Circuit's holding on immunity also contradicts *Briscoe v. LaHue*, 460 U.S. 325 (1983), improperly analyzing the *motives* of a creditor's attorney to falsify a

garnishment affidavit, and conflicts with other circuit courts.

The proper scope of federal lower court jurisdiction is a matter of paramount importance. The federal courts need further guidance in the application of the *Rooker-Feldman* doctrine – specifically, the courts need a clear test for distinguishing between claims that are effectively appeals of state court decisions, and claims that are truly independent. The court of appeals' decision authorizes federal district courts to invade state court judicial proceedings, to effectively reverse state court decisions and to allow a federal litigant to "do indirectly what he can no longer do directly." *Rooker*, 263 U.S. at 416.

If this Court does have jurisdiction, well-entrenched common law commands that participants, including judges, attorneys and witnesses, be free to exercise their duties within the continuum of judicial proceedings, free from the threat of collateral civil action by an opposing party. The Sixth Circuit's decision is an abrupt departure from that law, opening the doors of the federal courts to disgruntled state-court litigants and establishing a penalty for attorneys who properly represent their clients.

I. THE *ROOKER-FELDMAN* DOCTRINE

In 1923, the Court held that, pursuant to 28 U.S.C. § 1257, lower federal courts lack jurisdiction to hear what is, or is in essence, an appeal from a state court judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413. "[A]n aggrieved litigant cannot be permitted to do indirectly what he can no longer do directly." *Id.* at 416. "Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify

the [state court] judgment * * * To do so would be an exercise of appellate jurisdiction." *Id.*

In *Rooker*, the plaintiff brought a federal action alleging that a state court's decision was contrary to the Constitution. The Court reasoned that if the state court had personal and subject matter jurisdiction, but its decision was simply wrong, "that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding." *Id.* at 415. The Court viewed the federal action in *Rooker* as "merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of [the state court's] jurisdiction." *Id.* at 416.

Rooker was not the first time the Court recognized the importance of prohibiting federal courts from interfering with the jurisdiction of state courts, including the disposition of assets. In *Palmer v. Texas*, 212 U.S. 118, 131-32 (1909), the Court held that a federal court has no jurisdiction over property subject to a state court receivership "where the appointment of a receiver has been sustained by the highest court of the State under a general statute giving the right to appoint receivers in such cases and to take possession of the property . . . in the State." The Court reasoned:

> The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the

> jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty.

Id. at n.1. The Court concluded: "The Texas courts have the right to construe their own statutes, and their judgment in such matters is conclusive upon the Federal courts." *Id.* at 131.

Sixty years after *Rooker*, in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the Court held that federal district courts do not have jurisdiction to hear "challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." 460 U.S. at 486. Because claims that arise out of judicial proceedings are "inextricably intertwined" with the resulting state-court decisions, district courts likewise have no jurisdiction to hear such claims. *Id.* at 486-87.

The holdings of *Rooker* and *Feldman* combine to form the "*Rooker-Feldman* doctrine," a doctrine "grounded in principles of federalism and designed to serve two primary functions: [to] further[] the interest of finality in court decisions, and [to] ensure[] that federal courts show proper respect for their state counterparts." *Bass v. Butler*, 116 Fed. Appx. 376, 381 (3rd Cir. 2004). *See also Crutchfield v. Countrywide Home Loans & Mortg. Elec. Registration Sys.*, 389 F.3d 1144, 1147 (10th Cir. 2004) (the *Rooker-Feldman* doctrine "respects the values of federalism implicit in our parallel system of independent state and federal courts, with the United States Supreme Court at the apex of both – a structure established by the first Judiciary Act of 1789 and adhered to ever since"). However simple the doctrine may sound, its application has proven nonetheless complex for district and circuit courts across the country.

A. *Exxon* distinguishes the *Rooker-Feldman* doctrine.

Prior to *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), lower courts struggled to define the reach of the *Rooker-Feldman* doctrine. Some appellate courts, such as the Seventh Circuit, applied the *Rooker-Feldman* doctrine narrowly. *See GASH Assocs. v. Rosemont*, 995 F.2d 726 (7th Cir. 1993). Most circuits took an expansive view and considered the doctrine essentially coextensive with preclusion law. *See Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77 (2nd Cir. 2005).

In *Exxon*, this Court narrowed the application of the doctrine by distinguishing it from preclusion law. 544 U.S. at 284. Although *Exxon* dealt specifically with the case where there were parallel state and federal cases on the same issue, this Court also commented on the circumstance where a plaintiff initiates a federal claim after a state court decision is final:

> Nor does § 1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion."

Exxon, 544 U.S. at 293, *quoting GASH,* 995 F.2d at 728. In contrast, "a district court could not entertain constitutional claims attacking a state-court judgment, even if the state court had not passed directly on those claims, when the constitutional attack was 'inextricably intertwined' with the state court's judgment." *Id.* at 286, n.1, *quoting*

Feldman at 482, n.16. Accordingly, although this Court clearly instructed the lower federal courts to constrict their application of the *Rooker-Feldman* doctrine, nothing in *Exxon* evidenced an intent to overrule *Rooker* or *Feldman*.

B. The circuit courts are split following *Exxon*.

Unfortunately, *Exxon* exacerbated the conflicts in the application of the *Rooker-Feldman* doctrine.

1. The Limiting View – Second, Fourth, Sixth and Ninth Circuits.

After *Exxon*, the Second, Fourth and Sixth Circuits joined the Ninth Circuit in an extremely limited interpretation of the *Rooker-Feldman* doctrine, expanding the jurisdiction of the lower federal courts. Interpreting language from *Exxon* ("complaining of injuries *caused by* state-court judgments"), the "Limiting View" circuits apply the doctrine only if a federal plaintiff *explicitly* seeks to overturn a state court judgment or accuses the state court itself of wrongdoing, wholly ignoring *Feldman*. *Davani v. Va. DOT*, 434 F.3d 712, 718 (4th Cir. 2006); *McCormick v. Braverman*, No. 04-1708, 2006 U.S. App. LEXIS 15074, at *30 (6th Cir. 2006); *Manufactured Home Cmtys., Inc. v. City of San Jose*, 420 F.3d 1022 (9th Cir. 2005); *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77 (2nd Cir. 2005). This View ignores any practical effect a federal court's exercise of jurisdiction may have of reversing the state court decision. *Manufactured Home*, 420 F.3d 1022.

The Second Circuit was first among the previously expansive circuits to over-correct in *Hoblock*, 422 F.3d 77. *Hoblock* involved an election dispute between an election

board (the "Board") and candidates over counting absentee ballots. *Id.* at 82. The state court held that 40 absentee ballots were invalid and should not be counted. *Id.* Relying on the ruling, the Board did not count the ballots. *Id.* The state court losers then sued in federal court, arguing that the votes should have been counted. *Id.* at 83. The Second Circuit ruled that the *Rooker-Feldman* doctrine applied, but only because the "state-court judgment produced the Board's refusal to count the ballots" and was thus the source of the plaintiffs' injuries. *Id.* at 88-89.

Similarly, since *Exxon*, the Fourth Circuit has held that "the *Rooker-Feldman* doctrine applies only when the loser in state court files suit in federal district court seeking redress for an injury allegedly caused by the state court's decision itself." *Davani* at 713. In *Davani*, a state agency terminated a transportation worker, the employee appealed based on discrimination grounds, but lost before a state court. *Id.* Undeterred, the employee filed suit in federal district court repeating essentially the same claims. *Id.* The Fourth Circuit concluded that the plaintiff's claims were proper under *Exxon*: "Davani did not allege that the state decision caused him injury; rather, he alleged that Appellees discriminated against him in violation of federal and state law. Davani's federal claims do not challenge the state decision and are therefore 'independent' from that decision." *Id.* at 719.

Falling in line with the other Limiting View circuits, the Sixth Circuit recently held: "[i]f the source of the injury is the state court decision, then the *Rooker-Feldman* doctrine would prevent the district court from asserting jurisdiction. If there is some other source of injury, such as a third party's actions, then the plaintiff asserts an independent claim [and *Rooker-Feldman* does not apply]."

McCormick, 2006 U.S. App. LEXIS 15074, at *30. Thus, only "when a plaintiff asserts before a federal district court that a state court judgment itself was unconstitutional or in violation of federal law," will the *Rooker-Feldman* doctrine apply. *Id.* at *34.[2]

Unlike the Second, Fourth and Sixth Circuits, the Ninth Circuit employed the Limiting View prior to *Exxon*. *Manufactured Home*, 420 F.3d 1022 (*citing Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003)). In *Manufactured Home*, a city refused an owner permission to increase rents under a rent control program. *Id.* The owner filed a complaint in state court challenging the constitutionality of a city ordinance and the city's application of the ordinance. *Id.* at 1027-28. The owner lost. *Id.* The owner subsequently filed a complaint against the city in federal district court, again alleging constitutional violations from the city's decision. *Id.* at 1028. The court held that, because the owner filed his federal suit against the city, not the state court itself, *Rooker-Feldman* did not apply. *Id.* at 1030. The court also noted that the owner's complaint did not *directly* challenge the state court's conclusions. *Id.*

The Ninth Circuit summarized:

> If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and

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[2] *But see Kafele v. Lerner Sampson & Rothfuss, L.P.A.*, 161 Fed. Appx. 487, 490 (6th Cir. 2005) (debtor's FDCPA claims were "inextricably intertwined" with the state default judgments; "[w]here federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment" . . . "[t]hat the plaintiff's claims are indeed 'inextricably intertwined' is evident from the fact that there is simply no way for this court or any other court to grant relief without disturbing the judgments of foreclosure entered by the state court").

> seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction.

Manufactured Home, 420 F.3d at 1029.

2. The Traditional View – Fifth and Tenth Circuits.

In contrast, the Fifth and Tenth Circuits continue to apply the more "Traditional View" that the *Rooker-Feldman* doctrine prevents *de facto* appeals of state court judgments to federal district courts. *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1237 (10th Cir. 2006); *Williams v. Liberty Mut. Ins. Co.*, No. 04-30768, 2005 U.S. App. LEXIS 5660 (5th Cir. Apr. 7, 2005).

Under the post-*Exxon* Traditional View: "the *Rooker-Feldman* doctrine does not apply 'simply because a party attempts to litigate in federal court a matter previously litigated in state court.' To the contrary, a party may lose in state court and then raise precisely the same legal issues in federal court, so long as the *relief sought* in the federal action would not reverse or undo the *relief granted* by the state court." *Mo's Express* at 1237-38 (emphasis in original) (*quoting Exxon*, 544 U.S. at 293) (*Rooker-Feldman* held not to apply because federal claims seeking future injunctive relief would not disturb state court's decisions imposing fines; the operators "have not requested money damages that would compensate them for the amount of those penalties. Nor have they requested retrospective relief that would invalidate any past action of the [defendant]").

Hence, the Traditional View interprets *Exxon* to not have disturbed the spirit of the *Rooker-Feldman* doctrine.

3. The Practical View – Seventh Circuit.

The Seventh Circuit takes a practical approach to the *Rooker-Feldman* doctrine.[3] To determine whether the doctrine applies, the Seventh Circuit analyzes whether a federal plaintiff's claimed injuries *resulted from* a state court decision (the "Practical View"). *Bolte v. Koscove*, 156 Fed. Appx. 834, 836 (7th Cir. 2005) (holding that even if some of the alleged injury occurred prior to the state court ruling, the alleged fraud called into question the state court decision itself and was, therefore, inextricably intertwined, precluding jurisdiction). Under the Practical View, if a plaintiff's injuries for which he seeks a remedy were complete only upon issuance of the state court judgment, the doctrine applies. *Id.*; *see also Holt v. Lake County Bd. of Comm'rs*, 408 F.3d 335, 336 (7th Cir. 2005). The essence of the Seventh Circuit's analysis is a "but for" test: if a plaintiff "would not be in federal court but for the adverse state-court judgment," then federal district courts have no jurisdiction. *Alexander v. Washington,* 170 Fed. Appx. 429, 430 (7th Cir. 2006); *Holt*, 408 F.3d at 336.

The Seventh Circuit has also "recognized a distinction between a federal claim alleging injury caused by a state court judgment and a federal claim alleging a prior injury that a state court failed to remedy." *Bolte*, 156 Fed. Appx. at 837. Only if an *injury* is "independent of and complete prior to the [state court] entry" can it survive dismissal

[3] The Seventh Circuit's decision in *GASH Assocs. v. Rosemont*, 995 F.2d 726 (7th Cir. 1993) was one of only two lower court cases quoted with approval by this Court in *Exxon*. 544 U.S. at 293.

under *Rooker-Feldman*. *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 556 (7th Cir. 1999). On the other hand, if a federal plaintiff's injuries are complete "only when the [state court] entered the [judgment] order," then *Rooker-Feldman* applies. *Id.* at 557. "A plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a [federal] action." *Ritter v. Ross*, 992 F.2d 750, 754 (7th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994).

A federal plaintiff's otherwise independent claim must be severable from other claims barred by *Rooker-Feldman* to survive dismissal for want of jurisdiction. *GASH*, 995 F.2d at 728. If an otherwise independent claim is so intertwined and dependent on the state court judgment that separation is not feasible, the *Rooker-Feldman* doctrine bars that claim as well. *Id.*; *Bolte*, 156 Fed. Appx. at 837.

In *GASH*, for example, a partnership accused a city of driving down the price of its property before a foreclosure sale by initiating a condemnation proceeding. 995 F.2d at 727. The state court confirmed the foreclosure sale over the partnership's objections. *Id.* The partnership then commenced a federal action against the city. *Id.*

The Seventh Circuit ruled that the *Rooker-Feldman* doctrine applied to bar the partnership's claims because "the injury of which GASH complains was caused by the judgment." *Id.* at 729. Therefore, while the *source* of the wrongdoing and the injury was the city, the injury did not occur until the state court confirmed the sale. *Id.* at 728. Although the plaintiff did not *explicitly* attack the state court judgment, the doctrine applies because the partnership *implicitly* appealed the state court judgment by praying for relief that opposed the state court outcome. *Id.* at 729.

Accordingly, a clear conflict exists among the circuits as to the proper application of the *Rooker-Feldman* doctrine – a conflict this Court should address.

C. The Sixth Circuit misread *Exxon*.

The Sixth Circuit's decision in this action interprets *Exxon* as effectively overruling *Feldman*. The Sixth Circuit held that claims that are inextricably intertwined with state court decisions are governed by preclusion law, and not the *Rooker-Feldman* doctrine:

> * * * Plaintiff filed an independent federal claim that Plaintiff was injured by Defendant when he filed a false affidavit. This situation was explicitly addressed by the *Exxon Mobil* Court when it stated that **even if the independent claim was inextricably linked to the state court decision, preclusion law was the correct solution to challenge the federal claim, not *Rooker-Feldman***. * * * To follow the reasoning of Defendant would be to ignore these unambiguous directives from the Supreme Court.

434 F.3d at 437 (emphasis added).

The problem with the Sixth Circuit's conclusion is that it erroneously eviscerates the distinction between an "independent" claim and "inextricably intertwined" claim. An independent claim is one that is, by definition, not "inextricably intertwined." *Feldman* at 486-87. If, as the Sixth Circuit reasoned, *Exxon* stands for the proposition that "inextricably intertwined" claims are to be determined under preclusion law as opposed to the *Rooker-Feldman* doctrine, *Exxon* would have overruled *Feldman*. This Court did not state any such intent. To the contrary, this Court cited with approval both *Feldman* and *GASH*,

precluding jurisdiction over "inextricably intertwined" claims. *Exxon*, 540 U.S. at 286, 293.

D. The *Rooker-Feldman* doctrine applies in this case.

The *Rooker-Feldman* doctrine has been applied to preclude jurisdiction over FDCPA claims. *Kropelnicki v. Siegel*, 290 F.3d 118 (2nd Cir. 2002) (use of fraudulent statements to procure a default judgment in state court). *See also Johnson v. Lockyer*, 115 Fed. Appx. 895 (7th Cir. 2004) (garnishment proceedings); *Epps v. Creditnet, Inc.*, 320 F.3d 756 (7th Cir. 2003) (bad check charges requested and ordered in state court); *Jackson v. Peters*, 81 Fed. Appx. 282 (10th Cir. 2003) (garnishment proceedings); *Ellis v. CAC Financial Corp.*, 6 Fed. Appx. 765, 769 (10th Cir. 2001) (complaints of "improper assignments of the amount due, perjury, and notarization of rubber-stamped signatures"); *Bisbee v. McCarty*, 3 Fed. Appx. 819, 823 (10th Cir. 2001) (filing of a "knowingly fraudulent" suit); *Piotrowski v. Federman & Phelan, LLP*, No. 05-CV-1455, 2005 U.S. Dist. LEXIS 31359, at *10-11 (M.D. Pa. Nov. 22, 2005) (because a finding of fault with the state court foreclosure proceedings would "necessarily 'negate the state court's judgment,'" the plaintiff's federal action is "'inextricably intertwined' with the state-court judgment and falls squarely within the category of cases that the *Rooker-Feldman* doctrine precludes").

That an FDCPA claim is "inextricably intertwined" with a state-court decision can be evident from the federal plaintiff's requested relief. *Harper v. Chase Manhattan Bank*, 138 Fed. Appx. 130 (11th Cir. 2005) (FDCPA claim requesting injunction to restrain foreclosure); *Dickerson v. Bates*, 104 Fed. Appx. 699, 701 (10th Cir. 2004), *cert.*

denied, 544 U.S. 960 (2005) (RICO claims seeking reimbursement for losses resulting from the garnishment of funds). "If the relief sought by [a plaintiff] . . . would have the effect of 'undoing or preventing the enforcement of the state court's order,' it would be inextricably intertwined because it would require [a federal court] to render the state court's judgment ineffectual." *O'Brien v. Valley Forge Specialized Educ. Servs.*, No. 03-CV-5695, 2004 U.S. Dist. LEXIS 22947, at *13 (E.D. Pa. Nov. 10, 2004), *quoting Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411, 422 (3rd Cir. 2003). Logically, an action seeking the return of garnished funds "would require [the federal court] to 'effectively reverse the state court judgment.'" *Id.* at *15, *quoting Desi's* at 422.

In this case, the Ohio state court reviewed the garnishment Affidavit. The Affidavit did not assert that any formal debtor exam or discovery was performed (none is required under Ohio law) and did not identify any property that was *believed* "*may*" be exempt in the space provided – left blank. Nonetheless, the Ohio state court judge ordered that the Affidavit was "SATISFACTORY TO THE COURT" and issued its garnishment order to the plaintiff's bank, exercising jurisdiction over the parties and the plaintiff's funds within its sole discretion. *Fifth Third Bank, Inc. v. Bowman*, No. 89AP-515, 1990 Ohio App. LEXIS 529, at *9-10 (Franklin Cty. Feb. 13, 1990) (specificity requirements for an Ohio garnishment affidavit are "a matter of practice, resting in the discretion of the court of original jurisdiction"), *quoting Harrison v. King, Carey & Howe*, 9 Ohio St. 388, 393 (1859). The seizure of the plaintiff's funds, causing the damages for which he seeks remedies, was accomplished by the state court's order of garnishment, and not before.

Although the Ohio state court found that the Affidavit was proper and justified the issuance of the garnishment order, the plaintiff asks the federal district court to declare that it was not, and to award damages because it was not. Contrary to the Sixth Circuit's conclusion, the plaintiff complains of injuries caused by the state-court garnishment order and seeks relief that would reverse or undo the state-court's order. Under either the Traditional or the Practical View, *supra*, the federal district court does not have subject matter jurisdiction.

If the plaintiff wanted to attack the Affidavit or the conduct of the creditor's attorney, he could have done so by filing a motion for sanctions before the Ohio state court within 21 days. *See* Ohio R. Civ. P. 11; Ohio Rev. Code § 2323.51; *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St. 3d 432, 763 N.E.2d 1169 (2002). He did not. If he was unsatisfied with the Ohio state court's ruling on that motion, he could have then appealed further within the Ohio court system. The plaintiff chose to ignore state court procedures, to make an end run around the state court system and attempt to do in federal court what he is now time barred from doing in state court. However, the plaintiff "cannot be permitted to do indirectly what he no longer can do directly." *Rooker*, 263 U.S. at 416.

The federal district court has no jurisdiction over the plaintiff's claims. The plaintiff's complaint should have been dismissed.

II. ABSOLUTE IMMUNITY

At common law, participants throughout the judicial process are afforded absolute immunity from collateral civil claims. *Burns v. County of King*, 883 F.2d 819, 822 (9th Cir. 1989) (affidavit to revoke bail); *Sykes v. James*, 13 F.3d 515 (2nd Cir. 1993) (post-trial affidavit); *Demoran v.*

Witt, 781 F.2d 155, 157-58 (9th Cir. 1985) (pre-sentencing affidavit of probation officer); *Keys v. Chrysler Credit Corp.*, 494 A.2d 200, 204 (Md. 1985) (*garnishment affidavit*). Simply stated, "no action will lie for words spoken or written in the course of giving evidence or for words spoken or written in the course of any judicial proceeding," including those in post-judgment garnishment proceedings. *Keys*, 494 A.2d at 204.

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Court laid the framework for determining whether absolute witness immunity is to be applied in the context of a federal statutory claim. First, a court is to determine whether the immunity was "well established" when the statute was enacted. *Id.* at 330-31. Next, a court is to determine whether, in enacting the statute at issue, Congress evidenced an intent to abrogate the immunity. *Id.* at 334-36. If both of these questions are answered in the affirmative, the only remaining question is whether the party claiming immunity was serving a function within the judicial proceedings. *Id.* at 336.

The court has expressly denounced any "carve out" to the immunity based on an analysis of a participant's self-interest. *Briscoe* at 341-342. For example, the *Briscoe* petitioners argued that police officers should not be afforded immunity for their trial testimony because: (1) police officers have a duty to testify as part of their job; (2) police officers have a professional self-interest in achieving convictions; (3) police officers' later defense is undertaken by government employees, *i.e.*, the expense of defending collateral actions is not an issue; (4) police officers' testimony is more damaging because jurors trust them; and (5) police officers assist prosecutors and, therefore, would never be prosecuted for perjury. *Id.* In essence, the *Briscoe* petitioners argued that police officers have every reason to lie and, therefore, should not be immune. The Court

rejected these arguments, holding that "immunity analysis rests on functional categories, not on the status of the defendant." *Id.*

For this reason, police officers testifying in a criminal trial, like all other participants, are afforded immunity:

> Like witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses.

Burns, 500 U.S. at 489-90. Motive is irrelevant. *Id.*; *Briscoe* at 342.

As this Court has reasoned, attorneys perform integral functons within judicial proceedings:

> Subject to this restriction [of relevancy], it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not be impaired by numerous and refined distinctions.

Imbler v. Pachtman, 424 U.S. 409, 426 n.23 (1976), *quoting Hoar v. Wood,* 44 Mass. 193, 197-98 (1841). "As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Imbler* at 428, *quoting Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949) (Judge Learned Hand on prosecutor immunity), *cert. denied,* 339 U.S. 949 (1950).

This is not to say, however, that attorneys or other participants afforded immunity are beyond the reach of the law. *Imbler* at 429. To the contrary, both the legislature and the judiciary have built other checks and balances into the judicial system meant to "deter misconduct or to punish that which occurs," such as criminal sanctions for perjury and professional disciplinary measures. *Id.*

A. The Sixth Circuit ignored *Briscoe*.

In this case, the Sixth Circuit acknowledged that when the FDCPA was enacted in 1977, the absolute witness immunity was "well-established" and "nothing in the FDCPA itself or the legislative history of the act remotely suggests such an abrogation." 434 F.3d at 439. Hence, the only question is whether an attorney filing an affidavit to support a garnishment application to a state court, based on a valid underlying judgment, is performing a function within judicial proceedings. The answer clearly is yes.

"The purpose of witness immunity is to ensure that the judicial system functions unimpeded by fear on the part of its participants that they may be sued for damages for their role in the proceedings." *Giffin v. Summerlin*, 78 F.3d 1227, 1230-31 (7th Cir. 1996). The judicial process "embrace[s] all civil process incident to the commencement or continuance of legal proceedings." *Federal Housing Admin. v. Burr,* 309 U.S. 242, 245 (1940). "Garnishment and attachment commonly are part and parcel of the process, provided by statute for the collection of debts." *Id.* at 245-46. To say that garnishment proceedings are not part of the judicial process "would in general deprive suits of some of their efficacy."

Id. at 246. An attorney submitting a garnishment affidavit is serving a function within judicial proceedings. *Id.*

Contrary to this Court's prior holdings and viewing garnishment as a "mechanism to extract funds," the Sixth Circuit instead held that the proper inquiry to determine whether the immunity applies is to question whether the potential motives of a creditor's attorney fit within the rationales underlying the witness immunity. 434 F.2d at 442. Expressing general disdain for creditor's attorneys and "focus[ing] . . . on the incentives of Defendant in connection with this affidavit," the court of appeals found: (1) attorneys have to file the affidavits as part of their job; (2) attorneys have a professional self-interest in collecting money for their clients; (3) attorneys will just pass the extra costs on to their clients; (4) attorneys' financial interests will override their fear of being subject to suit; and (5) attorneys' false affidavits permit garnishment without investigation. *Id.* at 442-43. Thus, the Sixth Circuit advanced precisely the same reasoning as the *Briscoe* petitioners, reasoning that this Court expressly rejected as irrelevant. *Briscoe* at 341-42.

Accordingly, even though the Court expressly directed that it is the *function* and not the status or motives of the participant that is operative, the Sixth Circuit improperly ignored that directive to hold that the absolute immunity did not apply to the Petitioner in this case.

B. The Sixth Circuit improperly applied the complaining witness exception.

In *Malley v. Briggs,* 475 U.S. 335 (1986), the Court considered whether the absolute immunity applied to a state trooper who attested to a warrant application. Applying *Briscoe,* the Court found that a state trooper

obtaining a warrant was functionally equivalent to a "complaining witness" in 1871 – "one who procured the issuance of an arrest warrant by submitting a complaint." *Malley* at 340. Because a complaining witness could be sued for filing for an arrest "maliciously and without probable cause," the immunity could not apply to the statutory claim. *Id.* at 340-41.

Attempting to fit a square peg into a round hole, the Sixth Circuit erroneously found in this case that an attorney filing a garnishment affidavit is, like an officer obtaining a warrant, a complaining witness. 434 F.3d at 445. The two, however, are not functional equivalents.

A complaining witness "set the wheels of government in motion by instigating a legal action." 434 F.3d at 444. A garnishing attorney of a valid underlying judgment does not. "Deprivation" of a debtor's property is "accomplished by the [underlying] judgment, not the garnishment." *Agg v. Flanagan,* 855 F.2d 336, 343 (6th Cir. 1988). Where a judgment has been obtained on the debt and the creditor is merely attempting to enforce the Court's judgment, the enforcement is merely a "continuation of an existing proceeding." *Merlet v. Rizzo,* 64 Cal. App. 4th 53, 60 (Ca. App. 1998) (barring malicious prosecution claim). As this Court has held, garnishment on a valid judgment is "part and parcel" of the judicial proceedings and a necessary component thereof to give effect to a court's judgment. *Federal Housing, supra* at 245-46.

A complaining witness has to satisfy a probable cause requirement – an *evidentiary* requirement. *E.g., Gordy v. Burns,* 294 F.3d 722, 726-28 (5th Cir. 2002). Certain due process requirements must be met. *Id.* Conversely, a garnishing attorney enforcing a valid judgment has *no* evidentiary burden. *Monogram Credit Card Bank v.*

Hoffman, No. 14-02-24, 2003 Ohio App. LEXIS 1521 (Union Cty. Mar. 31, 2003); *Fifth Third Bank, supra.* The debtor has the only evidentiary burden. *Monogram, supra; McCahey v. L.P. Investors,* 774 F.2d 543, 550 (2nd Cir. 1985); *Ingram v. Hocking Valley Bank,* 125 Ohio App. 3d 210, 224, 708 N.E.2d 232, 241 (Athens Cty. 1997). Therefore, the Sixth Circuit's analogy of a post-judgment garnishment to a pre-judgment replevin action, finding any distinction to be "trivial," was particularly improper. To the contrary, this Court has found the constitutional due process distinction to be vast – a *pre-judgment* seizure requires pre-seizure notice and hearing (*Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969)) while a *post-judgment* debtor has no right to notice or a hearing *prior* to seizure (*Endicott Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924)).

While most states do recognize a cause of action for malicious prosecution or wrongful garnishment, these claims are available only when a party uses the mechanism of garnishment *without* a valid judgment, including pre-judgment seizures, or to harm a debtor, either of which take the act of garnishment *outside* the judicial process. Such abuse of process is a form of extortion or coercion "not properly involved in the proceeding itself. . . ." *Fite v. Lee*, 521 P.2d 964, 970 (Wash. App. 1974); *Layton v. Chase*, 144 N.W.2d 561, 564 (S.D. 1966) ("The repeated or successive garnishment of exempt property may, under certain circumstances, support an action for abuse of process. * * * However, the mere garnishment of money or property which may be claimed as exempt is not sufficient").

Stated differently, a valid underlying judgment is a complete bar to a claim at common law for malicious prosecution. *Lawrie v. Sears, Roebuck & Co.*, 745 F.2d 57

(6th Cir. 1984) ("This [default] judgment is . . . a complete defense to a claim for malicious prosecution"); *Delk v. Colonial Finance Co.*, 118 Ohio App. 451, 194 N.E.2d 885 (Hamilton Cty. 1963). *See also Vanover v. Cook*, 260 F.3d 1182, 1191 (10th Cir. 2001) ("No liability accrues for abuse of process where the defendant institutes a lawsuit to obtain damages or a collection procedure to recover a debt, even though the process is instituted with bad intentions or without probable cause"); *Robb v. Chagrin Lagoons Yacht Club,* 75 Ohio St. 3d 264, 270, 662 N.E.2d 9, 14 (1996) ("A cause of action for malicious civil prosecution will lie only in cases where there is a prejudgment seizure"); *Barnes v. Continental Acceptance Corp.*, No. 35499, 1977 Ohio App. LEXIS 7354, at *8 (Cuyahoga Cty. Feb. 17, 1977) ("The fact that cognovit judgment was validly rendered provides complete probable cause for instituting garnishment"); *Martin v. Cedar Lake Ice Co.*, 177 N.W. 631, 632 (Minn. 1920) ("The attempt to collect a valid and unpaid judgment by garnishment may not be held wrongful or unlawful"); *Troy v. Rogers*, 20 So. 999, Syllabus, ¶ 2 (Ala. 1896) ("In an action upon an attachment bond for the wrongful levy of a writ of attachment, a count of the complaint which bases the plaintiff's right to recover damages upon the ground that at the time of the levy he had no other property than such as was exempt under the law, which fact was known to plaintiff in attachment, states no cause of action").

The intersection of the absolute immunity, the "complaining witness" exception and common law actions for wrongful garnishment, therefore, is deceptively simple. If a party has a valid underlying judgment, then the garnishment process is merely a continuation of the judicial proceedings and the immunity applies. *Federal Housing, Briscoe* and *Delk*, *supra*. If, on the other hand, a party does

not have a valid underlying judgment or otherwise acts outside the judicial process, then the exception may apply. *See Fite*, *supra*. Because a valid underlying judgment was obtained against the plaintiff in this action prior to the filing of the Affidavit, the garnishment Affidavit was "part and parcel" of the judicial proceedings and the absolute immunity applies. *Briscoe*, *Federal Housing* and *Delk*, *supra*. The complaining witness exception does not apply in this action.

C. The Sixth Circuit's application of Ohio statutory law demonstrates why the *Rooker-Feldman* doctrine should apply.

This Court has emphasized the importance of allowing state courts to construe and apply their own statutes. *Palmer v. Texas*, 212 U.S. 118, 132 (1909) ("The Texas courts have the right to construe their own statutes, and their judgment in such matters is conclusive upon the Federal courts"). The lower federal courts have interfered in this case with the Ohio state court's application of its own statutes in two respects, each of which will have an extensive impact.

First, the court of appeals erroneously held that *Delk*, an Ohio case barring the plaintiff's claims for malicious prosecution based on allegations that two *garnishment affidavits* falsely averred that statutory notice had been provided because there was a valid underlying judgment, was applicable only to "the days when the creditor could garnish property without investigating the nature of the property" and "those days are no more in Ohio." 434 F.3d at 446. The Sixth Circuit based this conclusion on the assertion that "*Delk* could not possibly encompass this specific form of probable cause, as it was decided well

before the existence of the Ohio statutory requirement of the affidavit." *Id.* This is wrong.

Delk was decided in 1963. At that time, the Ohio statute *did* in fact require an affidavit of "good reason to believe." Ohio Rev. Code § 2715.11 (Eff. 10-1-53, App. 62).

Second, the court of appeals found "the specific probable cause requirement of Ohio law. . . . Defendant must *show* that it reasonably believes the garnished property is non-exempt." 434 F.3d at 446 (emphasis added). However, there is no such showing required under Ohio law.

The Ohio garnishment statutes do not require "that the [garnishment] affiant provide justification in the affidavit for the existence of its good-faith belief." *Fifth Third*, 1990 Ohio App. LEXIS 529, at *9. The garnishment affidavit is "a step in the remedial proceeding, conclusive upon no right of the party" and the degree of specificity of the statement is a "matter of practice, resting in the discretion of the [Ohio] court of original jurisdiction." *Id.* (citation omitted). No personal knowledge, evidence, or "probable cause" is required. *Id.* The court that has the discretion to determine the requisite level of specificity and content of the affidavit is the court that should determine whether an affidavit is insufficient or contains a misrepresentation – the state court. The federal court should not be permitted to overrule a state court on such an issue. *Palmer* at 132.

The state court ruled on the Affidavit's sufficiency in this case; yet, the plaintiff seeks to have a federal district court overrule the state court. This intrusion into the application by Ohio courts of Ohio statutory requirements brings the analysis within this Petition full circle to the reason why the *Rooker-Feldman* doctrine exists. The federal courts have no jurisdiction to, and should not, uproot state-court decisions.

CONCLUSION

The petition of Weltman Weinberg & Reis Co., L.P.A. for a writ of certiorari should be granted.

Respectfully submitted,

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434 F.3d 432

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT TODD, et al., *Plaintiffs-Appellees,*	
v.	No. 04-4109
WELTMAN, WEINBERG & REIS CO., L.P.A., *Defendant-Appellant,*	
MARK N. WISEMAN, *Defendant.*	

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 03-00171 – Susan J. Dlott, District Judge.

Argued: November 29, 2005

Decided and Filed: January 13, 2006

Before: CLAY and COOK, Circuit Judges; COOK, District Judge.*

COUNSEL

ARGUED: Christine M. Haaker, THOMPSON HINE, Dayton, Ohio, for Appellant. Stephen R. Felson, NEWMAN & MEEKS CO., Cincinnati, Ohio, for Appellees. **ON BRIEF:** Christine M. Haaker, THOMPSON HINE, Dayton, Ohio, for Appellant. Stephen R. Felson, NEWMAN & MEEKS CO., Cincinnati, Ohio, for Appellees.

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* The Honorable Julian A. Cook, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

CLAY, Circuit Judge. Defendant Weltman, Weinberg, & Reis Co., L.P.A. appeals an August 3, 2004 collateral order of the United States District Court for the Southern District of Ohio denying Defendant's motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) against Plaintiff Robert Todd's claims under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1691 *et seq.*, specifically violations of 15 U.S.C. §§ 1692e and 1692f. While the district court has not yet rendered final judgment, this Court reviews the collateral order of the district court denying Defendant absolute immunity. For the following reasons, we **AFFIRM** the district court's order.

I. BACKGROUND

A. PROCEDURAL HISTORY

On August 11, 2003, Plaintiff filed a complaint against Defendant in the United States District Court for the Southern District of Ohio. Plaintiff alleged Defendant violated the FDCPA, specifically 15 U.S.C. §§ 1692e and 1692f. Section 1692e of Title 15 of the United States Code states: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 1692f of Title 15 of the United States Code states: "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt."

On February 17, 2004, Defendant filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Defendant's motion was based on four grounds: (1) the district court did not have subject matter jurisdiction over Plaintiff's claim because of the *Rooker-Feldman* doctrine; (2) res judicata barred Plaintiff's claim; (3) Defendant was absolutely immune for its actions; and (4) the FDCPA was inapplicable to Defendant's actions. On August 3, 2004, the district court denied Defendant's motion on all grounds.

On September 1, 2004, Defendant timely appealed the district court order with respect to the issue of witness immunity. On September 20, 2004, Defendant filed a motion with the district court to certify that the district court's order involved a collateral order that was immediately appealable. On September 21, 2004, the district court denied the motion.

Plaintiff filed a motion to dismiss Defendant's appeal and a motion for sanctions. On February 9, 2004, this Court denied Plaintiff's motions. The Court found that the district court's denial of absolute immunity to Defendant was a collateral order that was immediately appealable in the absence of a final judgment.

B. FACTS

Plaintiff is a resident of Cincinnati, Ohio. Plaintiff's sole source of income is Social Security Insurance Benefits, and he receives $750 per month for himself. He also receives $190 per month for each of his minor children. His wife is presently receiving short-term disability payments for an injury she sustained.

In 1992, Plaintiff purchased furniture from Value City, and Plaintiff financed the purchase with a loan from ITT Financial Services. Plaintiff defaulted on the loan, and Defendant brought suit on behalf of the creditor and obtained a judgment. Defendant then initiated proceedings to garnish Plaintiff's bank account. In order to commence such a proceeding under Ohio law, Defendant must file an affidavit which states that "the affiant has a reasonable basis to believe that the person named in the affidavit as the garnishee may have property, other than personal earnings, of the judgment debtor that is not exempt under the law of this state or the United States." Ohio Rev. Code Ann. § 2716.11. On February 23, 2003, Defendant submitted an affidavit that conformed to the Ohio statute to the Hamilton County Municipal Court. The court found that the affidavit was valid and froze the funds in Plaintiff's bank account.

On February 12, 2003, Plaintiff requested a hearing to contend that the funds in his bank account were exempt because they derived from Plaintiff's Social Security benefits and his wife's short-term disability benefits. On February 28, 2003, the court held that the funds were exempt.

Plaintiff contended that prior to submission of the affidavit, Defendant did not conduct a debtor's exam, did not undertake discovery as to whether Plaintiff possessed non-exempt assets, and otherwise had no factual basis for believing that Plaintiff's bank account contained non-exempt assets.

II. DISCUSSION

A. THE *ROOKER-FELDMAN* DOCTRINE DOES NOT PRECLUDE THIS COURT'S SUBJECT MATTER JURISDICTION

1. Standard of Review

This Court reviews questions of subject matter jurisdiction *de novo*. *Green v. Ameritech Corp.*, 200 F.3d 967, 972 (6th Cir. 2000).

2. Analysis

This Court has an independent obligation to determine whether the Court has subject matter jurisdiction. *Olden v. LaFarge Corp.*, 383 F.3d 495, 498 (6th Cir. 2004). That said, the *Rooker-Feldman* doctrine does not divest this Court of subject matter jurisdiction because the instant case is outside the scope of the doctrine.

a. Legal Framework

In *Rooker v. Fidelity Trust Co.*, the plaintiffs filed an action in state court, and the state court ruled against the plaintiffs. 263 U.S. 413, 414 (1923). The state supreme court affirmed the decision. *Id.* The plaintiff then filed an action in federal district court alleging that the state court decision violated various federal constitutional provisions. *Id.* at 414-15. The district court dismissed the suit for lack of subject matter jurisdiction, and the Supreme Court affirmed. *Id.* at 415. The Court found that federal district courts were only empowered with original jurisdiction, and that they did not have appellate jurisdiction to hear a claim that a state court's decision was in error. *Id.* at 416.

Only the Supreme Court had such appellate jurisdiction. *Id.*

In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the Supreme Court reiterated its decision in *Rooker*. There, the plaintiff Feldman was an individual who sought to practice law but did not graduate from an accredited law school. *Id.* at 465. Instead, he completed a structured program of the State of Virginia where he studied in a practitioner's office, audited classes at the University of Virginia School of Law, and served as a judicial clerk with a federal district court. *Id.* The plaintiff passed the Virginia bar examination and was admitted to that state's bar. *Id.* The plaintiff then sought admission to the bar of the District of Columbia; however, the district had a rule that limited bar membership to graduates of ABA-accredited schools. The plaintiff filed a petition with the District of Columbia Court of Appeals to waive the graduation requirement, and the "state" court denied the plaintiff's petition. *Id.* at 466-68. The plaintiff then filed a complaint in the federal district court challenging the state court decision. *Id.* at 468. The plaintiff Hickey had a similar experience: he graduated from an unaccredited law school and petitioned the state court for waiver of the graduation requirement. *Id.* at 470-72. The state court denied his petition, and the plaintiff filed suit in federal district court.

The Supreme Court found that the federal district court lacked subject matter jurisdiction over an appeal from a state court judicial proceeding. *Id.* at 476. As a result, the plaintiffs could not challenge the state court's refusal to waive the graduation requirement in federal district court. *Id.* at 478-79. The plaintiffs could, however, challenge the constitutionality of the graduation requirement itself in

federal district court, as the state court promulgated the rule in a non-judicial setting. *Id.* at 482-86. The Court also ruled that the federal district court lacked jurisdiction over plaintiffs' claim that the state court arbitrarily denied them a waiver of the rule; the Court reasoned that such a claim was "inextricably intertwined" with the state court's judicial decisions in denying the plaintiffs' petitions. *Id.* at 486-87.

Subsequent to these cases, the federal courts of appeals began to apply the *Rooker-Feldman* doctrine to preclude federal subject matter jurisdiction in a wide variety of cases where the state court also asserted jurisdiction. Because of the inconsistencies between the circuits, the Supreme Court addressed the scope of the *Rooker-Feldman* doctrine in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S.Ct. 1517 (2005).

The Supreme Court in *Exxon Mobil* held that the *Rooker-Feldman* doctrine applied only to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 1521-22. *Exxon Mobil* dealt specifically with the case where there were parallel state and federal cases on the same issue. The court held that normal preclusion jurisprudence, not *Rooker-Feldman*, would guide the federal court decision if the state court reached a decision first. *Id.* at 1527. In dicta, the court also addressed the circumstance where the plaintiff initiated a federal claim after a state court decision:

> Nor does § 1257 stop a district court from exercising subject matter jurisdiction simply because a party attempts to litigate in federal court a

> matter previously litigated in state court. If a federal plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion."

Id. (alteration in the original) (quoting *GASH Assocs. v. Vill. of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993)).

b. Application to this Case

The *Rooker-Feldman* doctrine does not preclude jurisdiction over Plaintiff's claim. Defendant in the instant case claims this Court lacks subject matter jurisdiction because Plaintiff's federal claim is inextricably intertwined with the Ohio state court decision that Defendant's affidavit was valid. This argument ignores the fact that Plaintiff here does not complain of injuries caused by this state court judgment, as the plaintiffs did in *Rooker* and *Feldman*. Instead, after the state court judgment, Plaintiff filed an independent federal claim that Plaintiff was injured by Defendant when he filed a false affidavit. This situation was explicitly addressed by the *Exxon Mobil* Court when it stated that even if the independent claim was inextricably linked to the state court decision, preclusion law was the correct solution to challenge the federal claim, not *Rooker-Feldman*. *See supra*. While Defendant is technically correct that this guidance was not essential to the holding on the facts of *Exxon Mobil*, as that case dealt with parallel state and federal proceedings, the Supreme Court went beyond the facts of the case to give clear instructions to the circuits on how to address additional factual situations. To follow the reasoning of Defendant

would be to ignore these unambiguous directives from the Supreme Court.

The Court will not address the preclusive effect of the state court judgment, as this goes beyond the required jurisdictional determination and the issue on appeal.

B. THE DISTRICT COURT DID NOT ERR WHEN IT DENIED ABSOLUTE IMMUNITY TO DEFENDANT

1. Standard of Review

This Court reviews the district court decision denying Defendant absolute immunity *de novo*. *Brookings v. Clark*, 389 F.3d 614, 617 (6th Cir. 2004) (citing *Barnes v. Winchell*, 105 F.3d 1111, 1115 (6th Cir. 1997)).

2. Analysis

a. Legal Framework

In *Briscoe v. LaHue*, the Supreme Court held that police officers were absolutely immune from suit for their testimony at trial.[1] 460 U.S. 325, 345-46 (1983). In reaching its decision, the Court recited the history of the long-established rule that private witnesses were absolutely immune from damages liability for their testimony in judicial proceedings. *Id.* at 330-34. The rationale behind

[1] The plaintiffs in that case alleged that the police officers gave false testimony and, as a result, deprived the plaintiffs of the constitutional rights of due process and a fair trial. *Id.* at 328. The fact that the Supreme Court applied absolute witness immunity in such a case is an adequate answer to Plaintiff's contention that absolute witness immunity applies only in defamation cases. (*See* Pl. Br. 26-29.)

this absolute immunity was twofold: first, "witnesses might be reluctant to come forward to testify," *id.* at 333; second, those witnesses who came forward might distort their testimony because of fear of subsequent liability, *id.* The Court found that "the truth-finding process is better served if the witness's testimony is submitted to 'the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.'" *Id.* at 333-34 (quoting *Imbler v. Pachtman,* 424 U.S. 409, 440 (1976)).

In *Malley v. Briggs,* the Supreme Court held that police officers were not absolutely immune from suit for seeking an arrest warrant based on deficient probable cause. 475 U.S. 335, 340-41 (1986). The Court found that the police officer resembled a "complaining witness," and a complaining witness was liable at common law for making a complaint with malice and without probable cause. *Id.* The Court also rejected the argument that a police officer, when seeking an arrest warrant, makes a discretionary judgment similar to the absolutely protected judgment of a prosecutor seeking an indictment from a grand jury. *Id.* at 341-42 (referencing *Imbler,* 424 U.S. 409). In reaching its decision, the Court reasoned: "We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." *Id.* at 342-43.

The Court went on to refine its "complaining witness" analysis in *Kalina v. Fletcher,* 522 U.S. 118 (1997). There, the state prosecutor initiated criminal proceedings against the defendant and filed three documents, two of which

were unsworn, in support of the arrest warrant. *Id.* at 120-21. Under state law, an arrest warrant needed to be supported by sworn statements. *Id.* at 121. In order to satisfy this requirement, she summarized the evidence supporting the charge, including the evidence in the unsworn statements, in a "Certification for Determination of Probable Cause," and she personally vouched for the truth of the facts in the certification under penalty of perjury. *Id.* at 121. The defendant challenged the prosecutor's actions, as the certification in support of the warrant contained inaccurate factual statements. *Id.* at 121-22.

The Court began its analysis with the rule that "in determining immunity, we examine 'the nature of the function performed, not the identity of the actor who performed it.'" *Id.* at 127 (quoting *Forrester v. White,* 484 U.S. 219, 229 (1988)). The Court found that as to the prosecutor's actions in preparing and filing the two unsworn documents, the prosecutor was acting as an advocate of the state in the judicial process; therefore, her actions were protected by absolute immunity. *Id.* at 129. As to her attestation of the truth of the facts in the certification, the Court found that the prosecutor was not protected by absolute immunity: "Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause." *Id.* at 130-31. The Court found that the prosecutor thus acted as a "complaining witness" who lacked absolute immunity for the falsehoods in the certification. *Id.* at 129, 131.

In *Wyatt v. Cole,* 504 U.S. 158 (1992), the Supreme Court ruled that private defendants were not entitled to any form of immunity in § 1983 claims. In that case, the

plaintiff filed a state court complaint in replevin against his former business partner. *Id.* at 159-60. Under state law at the time, the plaintiff could "obtain a court order for seizure of property possessed by another by posting a bond and swearing to a state court that the [plaintiff] was entitled to that property and that the adversary wrongfully took and detain[ed] or wrongfully detain[ed] the property." *Id.* at 160 (internal quotations and citation omitted). State law did not grant any discretion to the state judge; he was forced to issue the order in replevin. *Id.* After a hearing, the state court dismissed the plaintiff's complaint in replevin and ordered the plaintiff to return the confiscated property to the defendant. When the plaintiff refused, the defendant sued the plaintiff in federal court, alleging, among other things, that the state replevin statute was unconstitutional and that the plaintiff and his attorney violated § 1983 by using state law to unconstitutionally deprive him of his property. *Id.* The district court found that the statute was unconstitutional because it violated the constitutional protection of due process; however, it found that the plaintiff and his attorney had qualified immunity "for conduct arising prior to the statute's invalidation." *Id.* at 160.

The Supreme Court reversed. The Court looked first at its "garnishment, prejudgment attachment, and replevin cases," and found that private use of state laws could constitute state action under § 1983. *Id.* at 162 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932-35 (1982)). The Court then analogized the claim challenging the replevin action to claims of malicious prosecution and abuse of process. The Court reiterated that in such cases, private party defendants did not have immunity:

> Respondents do not contend that private parties who instituted attachment proceedings and who were subsequently sued for malicious prosecution or abuse of process were entitled to absolute immunity. And with good reason; although public prosecutors and judges were accorded absolute immunity at common law, such protection did not extend to complaining witnesses who, like respondents, set the wheels of government in motion by instigating a legal action.

Id. at 164-65 (internal citations omitted). The Court found that while private party defendants at common law had a defense of good faith against claims of malicious prosecution and abuse of process, this defense did not equate to immunity in the § 1983 context. *Id.* at 165 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

b. Application to this Case

The district court correctly denied absolute immunity to Defendant. The rationales of absolute immunity and the complaining witness analysis support this result.

(i). Congressional Intent

Both Plaintiff and Defendant agree that Congress did not intend to abrogate the well-established absolute immunity of a witness when it enacted the FDCPA. This Court agrees that nothing in the FDCPA itself or the legislative history of the Act remotely suggests such an abrogation. The question then becomes whether Defendant's conduct falls under the protection of witness immunity.

(ii). The Affidavit as Testimony

This Court agrees with Defendant that testimony presented in the form of an affidavit may be protected under absolute witness immunity. *See Cruz v. Kauai County,* 279 F.3d 1064, 1068 (9th Cir. 2002) ("It is also true that, in this circuit, a person who functions as a witness in an adversarial proceeding to revoke a defendant's bail is to be accorded absolute immunity for her testimony, even if the witness's testimony is provided by way of affidavit." (citation omitted) (emphasis removed)); *Thomason v. SCAN Volunteer Servs., Inc.,* 85 F.3d 1365, 1373 (8th Cir. 1996) ("To the extent Wordlaw and SCAN are sued because Wordlaw made arguably false statements in her affidavit in her role as a witness before the state court, the doctrine of absolute witness immunity applies."); *Giffin v. Summerlin,* 78 F.3d 1227, 1231 (7th Cir. 1996) ("The policy considerations underlying witness immunity for testimony in open court apply with equal force to other forms of testimony such as depositions and affidavits." (citations omitted)). We find that the form of the witness testimony should not affect the status of the immunity attached thereto.

(iii). *Ex Parte* Nonadversarial Proceedings

Plaintiff argues that Defendant should not receive absolute witness immunity for its affidavit because the affidavit was submitted in an *ex parte,* nonadversarial proceeding. Under Ohio law, Defendant can initiate a garnishment proceeding by filing the affidavit described, *supra,* with the state court. Ohio Rev. Code Ann. § 2716.11. The state court then "binds" the garnished property until a hearing so that the garnishee may not use the property.

Ohio Rev. Code Ann. § 2716.13. Ohio law does not allow Plaintiff to challenge Defendant's affidavit when it is submitted; it only allows a challenge at a hearing after the property has already been bound. Ohio Rev. Code Ann. § 2716.21. Plaintiff contends that Defendant should not receive absolute immunity for its affidavit because there were no procedural safeguards in insuring the veracity of the affidavit at the time it was submitted, due to the *ex parte,* nonadversarial nature of the initiation of garnishment proceedings under Ohio law.

In support of its contention that the touchstone of witness immunity is the adversarial nature of the proceeding, Plaintiff cites several cases of other circuits. In *Cruz v. Kauai County,* the Ninth Circuit found that a prosecutor's affidavit supporting revocation of the defendant's bail was not entitled to absolute immunity because the affidavit was submitted at an *ex parte* proceeding. 279 F.3d at 1068. While the court also based its decision on the fact that the prosecutor acted as a "complaining witness," it focused its analysis on the fact that the prosecutor "functioned as a witness in an *ex parte* proceeding, at which [the defendant] did not enjoy the protections of the adversary process." *Id.* In contrast, the Ninth Circuit found absolute immunity applicable to an affidavit in *Burns v. County of King* – precisely because the proceeding where the affidavit was submitted was adversarial:

> Although the opportunity for cross-examination is absent in this case, since [the defendant's] testimony was presented in the form of an affidavit, [the plaintiff] was nevertheless afforded all the other protections of the adversary process and judicial supervision. . . . [The plaintiff] was entitled to present affidavits and witnesses of his own to refute the statements made by [the defendant].

> Under these circumstances, we conclude that the rationale underlying *Briscoe* requires that [the defendant] be accorded absolute immunity for her statements to the court.

883 F.2d 819, 823 (9th Cir. 1989).

Likewise, the Fifth Circuit found that a report prepared by an expert witness that supported probable cause for an arrest was not entitled to absolute immunity. In *Keko v. Hingle*, the court began its analysis with the notion that the Supreme Court "has subsequently bounded absolute immunity within the precise confines of adversarial judicial proceedings." 318 F.3d 639, 642-43 (5th Cir. 2003) (citations omitted). The court found that absolute immunity did not apply to the expert report submitted in an *ex parte* probable cause hearing: "We decline to extend absolute witness immunity into an arena where the Supreme Court had not found factual testimony to justify such heightened protection." *Id.* at 643. The court expressly based its decision on this fact, and not on the "complaining witness" theory, as it declined to address that factual question on a motion for summary judgment. *Id.*

In *Curtis v. Bembenek*, the Seventh Circuit applied a similar analysis to the testimony of a police officer at two separate hearings. 48 F.3d 281, 285 (7th Cir. 1995). The court found that "the policy considerations for granting absolute immunity to witnesses testifying at trial apply with equal force to witness testimony in adversarial pretrial settings." *Id.* (citation omitted). Because the police officer's testimony at both hearings "was made under oath and subject to cross-examination, [w]e see no principled basis for distinguishing between [adversarial] pretrial proceedings and the trial on the merits in determining

whether absolute immunity should be granted to a police officer witness." *Id.* (internal quotations and citation omitted).

In *Sykes v. James*, the Second Circuit found that the petitioner's parole officer was absolutely immune for an affidavit submitted in the petitioner's habeas proceeding. 13 F.3d 515, 521 (2d Cir. 1993). The court stressed that:

> A habeas corpus proceeding brought under the pertinent New York statute is surrounded by all the judicial process safeguards. . . . Although cross-examination is not available . . . , all the other protections of the judicial process were afforded to [the petitioner]: the proceeding was adversarial in nature; it was conducted by a judicial officer who rendered the final decision; and it was subject to judicial review. Moreover, the affidavit oath subjected [the parole officer] to the penalty of perjury if the affidavit were false; [the petitioner] had the opportunity to present affidavits of his own; and testimony could have been taken if the judge considered it necessary.

Id. The court then distinguished *Malley,* as that case involved an *ex parte* hearing. *Id.* (citing *Malley,* 475 U.S. 335).

While Plaintiff's proposed inquiry of adversarial-nonadversarial for questions of absolute immunity is viscerally appealing, considering the ease of its application and its partial support in the rationale of *Briscoe,* it is ultimately unviable. We agree with the cited cases insofar as they stand for the proposition that witness testimony at an adversarial proceeding is entitled to absolute immunity, because this proposition is supported by the rationale in *Briscoe* that witness immunity, coupled with "the crucible

of the judicial process," is the path that would best "lead to the ascertainment of truth." *See Briscoe,* 460 U.S. at 330-34 (internal quotations and citations omitted).

We do not agree, however, that the nonadversarial nature of a proceeding automatically precludes applicability of absolute immunity to witness testimony given at such a proceeding. One glaring example not mentioned by either Plaintiff or Defendant is witness testimony in grand jury proceedings. A grand jury proceeding is the quintessential form of an *ex parte,* nonadversarial proceeding where many of the procedural safeguards of a trial do not exist. Despite this fact, most circuits, including this circuit, have held that absolute witness immunity applies to witness testimony before a grand jury. *See Grant v. Hollenbach,* 870 F.2d 1135, 1139 (6th Cir. 1989) (citing *Macko v. Byron,* 760 F.2d 95, 97 (6th Cir. 1985)); *see also Lyles v. Sparks,* 79 F.3d 372, 378 (4th Cir. 1996); *Frazier v. Bailey,* 957 F.2d 920, 931 n.12 (1st Cir. 1992); *Anthony v. Baker,* 955 F.2d 1395, 1400-01 (10th Cir. 1992); *Little v. City of Seattle,* 863 F.2d 681, 684 (9th Cir. 1989); *Strength v. Hubert,* 854 F.2d 421, 423 (11th Cir. 1988), *overruled on other grounds by Albright v. Oliver,* 510 U.S. 266 (1994); *San Filippo v. U.S. Trust Co., Inc.,* 737 F.2d 246, 254 (2d Cir. 1984); *Kincaid v. Eberle,* 712 F.2d 1023, 1023-24 (7th Cir. 1983); *Briggs v. Goodwin,* 712 F.2d 1444, 1448-49 (D.C. Cir. 1983). Most circuits have found that the *Briscoe* rationale of encouraging truthful testimony at trial applies with equal force to testimony before a grand jury; additionally, several circuits have explained that at common law, a witness is absolutely immune for grand jury testimony. *See, e.g., Kincaid,* 712 F.2d at 1023-24. These cases demonstrate that the adversarial-nonadversarial delineation proposed by Plaintiff is untenable.

The question then becomes what the proper inquiry actually should be. We find that a reviewing court should look at the twin rationales listed in *Briscoe*: insuring that a witness is unafraid of providing testimony, and, when the witness testifies, insuring that the witness is not impermissibly pressured to alter her testimony. 460 U.S. at 333-34. Additionally, a reviewing court should look to the common law to determine whether immunity was available in specific instances.

(iv). *Briscoe* Rationales

The *Briscoe* Court gave two rationales in support of the common law immunity for witness testimony: (1) "witnesses might be reluctant to come forward to testify" without such immunity; and (2) "once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." 460 U.S. at 333-34. Neither of these rationales applies to this case.

After obtaining a default judgment on behalf of its client creditor, Defendant sought some mechanism to extract funds from Plaintiff to satisfy this judgment; Defendant chose garnishment. As explained, *supra,* under Ohio law, in order to garnish Plaintiff's property, Defendant was required to file an affidavit which stated that it had a reasonable basis to believe that the property was non-exempt. The focus, then, is on the incentives of Defendant in connection with this affidavit.

With respect to the first rationale, this Court finds it difficult to believe that Defendant would "be reluctant to come forward to testify" without absolute immunity. Defendant is responsible to its client; the client in this case enlisted Defendant to obtain money from Plaintiff. In

such circumstances, Defendant is unlikely to disobey its client, nor will Defendant ordinarily refuse to take future creditor clients, without absolute immunity for its affidavit. The lack of absolute immunity may increase Defendant's costs of collecting a debt on behalf of a creditor; Defendant may actually be forced to obey Ohio law and conduct some sort of preliminary investigation of a debtor's assets to determine whether they are exempt. This increase in costs, however, will not be a disincentive for Defendant to pursue actions of garnishment. This cost can simply be passed on to the client; moreover, because all attorney debt collectors would have the same incentive to make this preliminary investigation, Defendant's competitive position would not be harmed by denying absolute immunity for its affidavit. In short, Ohio law requires a procedural safeguard that does increase the cost of pursuing a garnishment action; however, because garnishment actions will remain profitable for the attorney debt collector and its client, this Court has no doubt that the attorney debt collector will continue to bring such actions. Defendant's financial interest will overcome any reluctance to come forward based on the lack of absolute immunity; the same cannot be said, for example, for a witness who has no interest in the outcome of a criminal case.

Briscoe's second rationale is equally inapplicable. The Supreme Court in *Briscoe* was cognizant of a witness' fear of being completely candid without absolute immunity; the witness "might be inclined to shade his testimony . . . , to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence." 460 U.S. at 333. Here, the possibility to introduce such variability into Defendant's testimony was limited. The affidavit made one

and only one statement: that Defendant had a reasonable basis to believe that certain property of Plaintiff was non-exempt. Of course, Defendant and Plaintiff may disagree as to whether Defendant had such reasonable basis; for example, Plaintiff may claim that a preliminary investigation made by Defendant was insufficient. This, however, is beside the point of *Briscoe*. The focus is on the testimony itself, not on the factual basis of the testimony. With the affidavit, Defendant has no room to shade its testimony, to magnify uncertainties, to distort the evidence; Defendant cannot say that it *might* have a reasonable basis, or that there is a *possibility* that it does not have a reasonable basis. Defendant cannot be equivocal in its affidavit: it states that it either has a reasonable basis or it does not. In other words, Defendant, even if it has an incentive to "play it safe" with ambiguous language because of a lack of absolute immunity, it has no ability to do so, as Defendant must make the definitive statement that it has a reasonable basis. Thus, Defendant will not have to fear "repercussion from a disgruntled opponent over the meaning and implication of every sworn word," (Def. Br. 28), as the battle will not be fought over semantics so much as the substance of the testimony.

The fact that Defendant has to be unequivocal in the affidavit without the protection of absolute immunity will not cause Defendant to cease submitting these affidavits and to stop seeking garnishment actions, as this would be wholly contrary to Defendant's financial interests. Instead, Defendant will have the incentive to conduct some sort of investigation or have some other reasonable basis for its affidavit, as required by Ohio law.

(v). Common Law

Most states recognize some cause of action to address a plaintiff's claim of improper garnishment:

> Where an order of attachment or garnishment is improperly obtained or tortiously employed, the defendant in the proceedings may have several modes of obtaining redress for injuries caused thereby. He may proceed on the attachment or garnishment bond, if one has been given, sue for malicious or wrongful attachment or garnishment, or maintain an action for abuse of process or malicious prosecution.[2]

6 Am. Jur. 2d Attachment and Garnishment § 604. "As with the tort of malicious prosecution, two of the necessary elements of a cause of action for wrongful garnishment are (1) an absence of probable cause for such proceeding, and (2) the presence of legal malice, which 'may be inferred entirely from a lack of probable cause.'" *Burshan v. Nat'l Union Fire Ins. Co.*, 805 So.2d 835, 845 (Fla. Dist. Ct. App. 2001) (quoting *Adams v. Whitfield*, 290 So.2d 49, 51 (Fla. 1974)). One court has stated that "[w]hether a garnishment is wrongful depends upon whether the steps taken by the parties seeking the writ comply with the statute authorizing such relief." *Chandler v. Cashway Bldg. Materials, Inc.*, 584 S.W.2d 950, 952 (Tex. App. 1979).

In addition, certain states have explicitly ruled that a cause of action for wrongful garnishment may arise from the garnishment of exempt property. *Owens v. Deutch*, 137

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[2] Defendant's argument that Plaintiff cannot maintain a malicious prosecution claim for a writ of garnishment as long as the underlying judgment is valid is not well taken. *See infra.*

P.2d 181, 185 (Kan. 1943); *Grimestad v. Lofgren,* 117 N.W. 515 (Minn. 1908); *Rice v. Chase,* 9 N.H. 178 (1838). *See generally* 6 Am. Jur. 2d Attachment and Garnishment § 612. One state has ruled that a single instance of garnishment of exempt property does not amount to abuse of process, but multiple instances may be sufficient. *Layton v. Chase,* 144 N.W.2d 561, 564 (S.D. 1966).

The case law cited above demonstrates that states have allowed claims where a plaintiff alleges an improper garnishment, whether the claim is one of malicious prosecution, abuse of process, or wrongful garnishment. This includes a claim that the defendant improperly garnished exempt property. The defendant is not entitled to absolute immunity to counter these claims; instead, he has the defenses of probable cause and lack of malice. This common law backdrop generally indicates that Defendant would not be absolutely immune from suit for an improper garnishment.

The question then becomes whether Defendant, although not immune from suit, should receive absolute immunity for the statements he made in the affidavit. From the Supreme Court precedent previously discussed, this Court draws several rules:

(1) A private witness testifying at trial is absolutely immune for her testimony;

(2) A private witness testifying at a grand jury is absolutely immune for her testimony;

(3) A private witness testifying as a complaining witness has no immunity for her testimony.

This Court finds that Defendant is a complaining witness.[3] In *Wyatt,* the Supreme Court ruled that "although public prosecutors and judges were accorded absolute immunity at common law, such protection did not extend to complaining witnesses who, like respondents, set the wheels of government in motion by instigating a legal action." 504 U.S. at 164-65 (citation omitted). Here, Defendant instigated the legal action of garnishment and "set the wheels of government in motion." In order to do so, Defendant swore to the truth of a certain set of facts, *i.e.,* it had reasonable belief that the target property of the garnishment was non-exempt. Because of this affidavit, the state court then bound Plaintiff's bank account. Defendant's garnishment action is the result of Defendant's "complaint" that Plaintiff had non-exempt property, and that Plaintiff thus owed this non-exempt property to Defendant.

From this Court's perspective, Defendant's actions mirror the instigation of an action in replevin. As explained in *Wyatt,* the Supreme Court had grouped together replevin and garnishment actions in the § 1983 context, and with good reason. The two actions are quite similar: in both claims, the plaintiff believes the defendant holds property to which the plaintiff is entitled; in both claims, the plaintiff files an affidavit that swears to his belief; in both claims, the court then dispossesses the defendant of

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[3] In support of its claim of absolute immunity, Defendant cites *Etapa v. Asset Acceptance Corp.,* 373 F. Supp. 2d 687 (E.D. Ky. 2004), and *Beck v. Codilis,* No. 4:99 CV 485-RH, 2000 WL 34490402 (N.D. Fla. Dec. 27, 2000), two cases that specifically addressed false affidavits with respect to FDCPA claims. Because neither case addresses the complaining witness analysis, they are unpersuasive in the present factual context.

the property or otherwise limits the defendant's use; and in both claims, the defendant then has the right to a hearing to prove that the property properly belongs to him. In *Wyatt,* the Supreme Court noted that a private defendant was not immune from suit for instigating an improper replevin action under a claim of malicious prosecution or abuse of process; the defendant did, however, have the defense of good faith. 504 U.S. at 164-65. This Court sees no principled distinction that justifies differing treatment for an improper garnishment action.

Defendant may argue that an action in replevin is a prejudgment action, whereas a garnishment action is a postjudgment action. This is a trivial distinction. The fact that Defendant obtained an underlying judgment in support of the garnishment is irrelevant; the validity of the underlying judgment does not extend to an ancillary action. This Court looks only to the garnishment action itself to determine whether that claim was properly made.

Defendant argues that the complaining witness analysis does not apply because the complaining witness analysis deals only with arrest warrants, and no analogy can be drawn to this case because the probable cause requirement for arrest warrants derives from the Constitution, whereas Plaintiff does not and cannot make the same constitutional claim for an improper garnishment. While the Supreme Court used the complaining witness analysis in *Malley* in its treatment of a police officer's statement to support probable cause for an arrest warrant, the analysis derives from the common law tort of malicious prosecution. *Malley,* 475 U.S. at 341 n.3. If a private defendant instituted a baseless civil suit without probable cause and with malice against the plaintiff, then the plaintiff would have a cause of action against the defendant based

not in the Constitution but in the common law, and the defendant would be a complaining witness without absolute immunity. Likewise, if a private defendant instituted an improper garnishment action without probable cause and with malice, the plaintiff garnishee would have a cause of action at common law. *See supra.* Thus, the complaining witness analysis applies outside of the constitutional context.

Defendant next argues that "no analogy can be drawn between a claim for malicious prosecution and a claim that an affidavit in aid of garnishment contains a false statement." (Def. Reply Br. 7.) This Court disagrees. As explained above, a plaintiff garnishee can use malicious prosecution as a claim to remedy an improper garnishment, so malicious prosecution is not just analogously on point; it is directly on point. This is logical, as malicious prosecution is defined as "a suit for damages brought by one against whom a criminal prosecution, civil suit, or other legal proceeding has been instituted maliciously and without probable cause, after the termination of the former proceedings in favor of the defendant." 52 Am. Jur. 2d Malicious Prosecution § 1. Here, Defendant instituted a garnishment proceeding against Plaintiff, and the proceeding ended in favor of Plaintiff. Plaintiff claims the proceeding was instituted maliciously and without probable cause because Defendant did not have a reasonable basis to believe that Plaintiff's property was non-exempt. Plaintiff could thus sufficiently state a claim of malicious prosecution to which Defendant could not assert a defense of absolute immunity. *Wyatt,* 504 U.S. at 164.

Defendant argues that as long as the underlying judgment is valid, there can be no claim of malicious prosecution with respect to a garnishment action. None of

the cases to which Defendant cites support this contention. In *Vanover v. Cook*, the court found that the plaintiff had failed to state a malicious prosecution claim, because no judgment had been entered in the plaintiff's favor. 260 F.3d 1182, 1189-90 (10th Cir. 2001). It is undisputed in the instant-case that the state court dismissed the garnishment of Plaintiff's bank account. *Novick v. Becker* actually supports Plaintiff's position: the court found that "the detention of the funds of a party by garnishment is such interference with his property as to sustain an action of malicious prosecution." 90 N.W.2d 620, 622 (Wis. 1958). The court ultimately found that the plaintiff did not properly allege lack of probable cause on the part of the defendant. *Id.* at 623. *Duckworth v. Boykin* dealt with a case where the plaintiff in the malicious prosecution suit "made an unsuccessful attempt to obtain a judgment that the money raised by the garnishment was exempt from that process." 41 S.E. 62, 62 (Ga. 1902). In other words, the garnishment action was good, and thus the malicious prosecution claim failed, because the plaintiff failed to show that the garnished property was exempt. Here, Plaintiff has shown and the state court has ruled that the garnished property was exempt. *Salsgiver v. Standard Oil Co.* was a case where the plaintiff failed to prove malice; it did not state that a plaintiff could never maintain a malicious prosecution claim if there was a valid underlying judgment. No. 77 C.A. 66, 1978 WL 214778 (Ohio Ct. App. Jan. 17, 1978).

The only case that possibly lends support to Defendant's contention is *Delk v. Colonial Fin. Co.*, 194 N.E.2d 885 (Ohio Ct. App. 1963). There, the state court reasoned that "[i]t is obvious that the existence of defendant's valid judgment provided complete probable cause for instituting

garnishment proceedings." *Id.* at 888. This Court agrees that generally, when a creditor has obtained a judgment, she may then seek garnishment; however, this general probable cause does not equate to the specific probable cause requirement of Ohio law that Defendant have a reasonable basis to believe that the property garnished is non-exempt. In other words, it is no answer that Plaintiff owes Defendant money, and that Plaintiff owns property; Defendant must show that it reasonably believes the garnished property is non-exempt. Moreover, *Delk* could not possibly encompass this specific form of probable cause, as it was decided well before the existence of the Ohio statutory requirement of the affidavit. While the language in *Delk* was applicable to the days when the creditor could garnish property without investigating the nature of the property, those days are no more in Ohio.

Defendant's actions could properly be characterized as malicious prosecution. As a result, it is a complaining witness without absolute immunity. The fact that Plaintiff is suing under the FDCPA and not the common law claim does not affect the immunity status of Defendant. As the Supreme Court stated in *Kalina,* "in determining immunity, we examine the nature of the function performed." 522 U.S. at 127 (internal quotations and citation omitted). In this case, Defendant functioned as a complaining witness, so it may not assert absolute immunity against any claim in connection with this role.

From a practical perspective, treating Defendant as a complaining witness without immunity simply makes sense. The Court reserves absolute immunity for individuals when they functionally serve as "integral parts of the judicial process," such as judges, advocates, and witnesses in their ordinary judicial roles. *Briscoe,* 460 U.S. at 335.

The purpose of this immunity is to preserve the integrity of our judicial system, not to assist a self-interested party who allegedly lies in an affidavit to initiate a garnishment proceeding.

III. CONCLUSION

For the foregoing reasons, this Court **AFFIRMS** the order of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-4109

ROBERT TODD, et al.,
Plaintiff-Appellee,

v.

WELTMAN, WEINBERG & REIS CO., L.P.A.,
Defendant-Appellant,
MARK N. WISEMAN,
Defendant.

Before: CLAY and COOK,
Circuit Judges; COOK, District Judge.

JUDGMENT

(Filed Jan. 13, 2006)

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the collateral order of the district court denying Defendant absolute immunity is AFFIRMED.

**ENTERED BY ORDER
OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

348 F.Supp.2d 903

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Robert Todd *et al.*,	:	Case No. C-1-03-171
Plaintiffs,	:	District Judge Susan J. Dlott
v.	:	
Weltman, Weinberg & Reis, Co., L.P.A. *et al.*,	:	ORDER DENYING MOTIONS FOR JUDGMENT ON THE PLEADINGS
Defendants.	:	

This matter comes before the Court on the Motion of Defendant Mark N. Wiseman for Judgment on the Pleadings (doc. #40) and the Motion of Defendant [] Weltman, Weinberg & Reis, Co., L.P.A., for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c) (doc. # 55). For the following reasons, the Court **DENIES** Defendants' motions.

I. STANDARD FOR A RULE 12(C) MOTION

Federal Rule of Civil Procedure 12(c) governs motions for judgment on the pleadings. In reviewing a motion under Rule 12(c), the Court accepts as true the factual allegations of the complaint. *See Pilgrim v. Littlefield,* 92 F.3d 413, 415 (6th Cir. 1996); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1368 (2d ed. 1990). The Court may, however, "consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice." *New England Health Care Employees*

Pension Fund v. Ernst & Young, LLP, 336 F.3d 495, 501 (6th Cir. 2003) (addressing motions brought pursuant to Rule 12(b)(6)). Additionally, to the extent that the instant motion questions the existence of subject matter jurisdiction, the Court "may look beyond the jurisdictional allegations in the complaint and consider whatever evidence is submitted." *Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel Known as The Captain Lawrence,* 105 F.3d 1078, 1081 (6th Cir. 1997), *vacated on other grounds,* 523 U.S. 1091 (1998). A motion for judgment on the pleadings "is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Paskvan v. City of Cleveland Civil Serv. Comm'n,* 946 F.2d 1233, 1235 (6th Cir. 1991).

II. FACTUAL BACKGROUND

This case is a putative class action brought pursuant to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1601 *et seq.* Plaintiff Robert Todd brings a claim against Defendant Weltman, Weinberg & Reis. Co., L.P.A. ("Weltman"), counsel for one of his creditors, and Plaintiff Helen Williams, by her next friend Angela McGowan, brings a claim against Defendant Mark N. Wiseman, counsel for one of her creditors. Plaintiffs' claims are based on affidavits that Defendants executed and filed in support of non-wage garnishment proceedings. Mr. Todd brings suit against Weltman on behalf of all judgment debtors in the State of Ohio with respect to whom Weltman filed such an affidavit, and Ms. Williams brings suit against Mr. Wiseman on behalf of all judgment debtors in the State of Ohio

with respect to whom Mr. Wiseman filed such an affidavit.[1] Pursuant to the standard for Rule 12(c) motions as set forth above, the Court takes as true the allegations set forth in the Amended Complaint, except to the extent that Defendants raise contrary evidence in questioning the existence of subject matter jurisdiction.

Section 2716.11 of the Ohio Revised Code governs the commencement of non-wage garnishment proceedings:

> A proceeding for garnishment of property, other than personal earnings, may be commenced after a judgment has been obtained by a judgment creditor by the filing of an affidavit in writing made by the judgment creditor or the judgment creditor's attorney setting forth all of the following:
>
> (A) The name of the judgment debtor whose property, other than personal earnings, the judgment creditor seeks to garnish;
>
> (B) That the affiant has good reason to believe and does believe that the person named in the affidavit as the garnishee has property, other than personal earnings, of the judgment debtor that is not exempt under the law of this state or the United States; [and]
>
> (C) A description of the property.

Certain sorts of assets, including Social Security payments, are statutorily exempt from attachment by creditors. *See,*

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[1] Plaintiffs William Carter and Jean Riley brought class claims against Christopher L. Lardiere that have settled. (*See* doc. #66.)

e.g., 42 U.S.C. § 407(a); Ohio Rev. Code § 2329.66. Upon the filing of an affidavit pursuant to section 2716.11, the clerk of the appropriate Ohio court "shall" issue to the garnishee copies of an order of garnishment of property that "shall bind the property, other than personal earnings, of the judgment debtor in the possession of the garnishee at the time of service." Ohio Rev. Code § 2716.13. The statute provides that the order of garnishment and notice to answer must be "substantially" in a certain form as provided in section 2716.13(B):

> The judgment creditor in the above case has filed an affidavit, satisfactory to the undersigned, in this Court stating that you have money, property, or credits, other than personal earnings, in your hands or under your control that belong to the judgment debtor, and that some of the money, property or credits may not be exempt from garnishment under the laws of the State of Ohio or the laws of the United States.

Ohio Rev. Code § 2716.13(B). The clerk of the court also must warn the judgment debtor in writing that if he does not request a hearing within five days, he waives his right to a hearing and some of his money, property or credits will be paid to the judgment creditor to satisfy the debtor's debt. *See* Ohio Rev. Code § 2716.13(C)(1).

Both Mr. Todd and Ms. Williams allege that they are recipients of Supplemental Security Income ("S.S.I.") who had default judgments entered against them in Hamilton County, Ohio Municipal Court and that Defendants Weltman and Wiseman sought to collect on those judgments by filing garnishment proceedings. On January 21, 2003, Weltman attorney Nicholas K. Rohner signed a form

affidavit seeking garnishment of Mr. Todd's bank account at Fifth Third Bank, swearing, *inter alia*:

> I HAVE GOOD REASON TO BELIEVE AND DO BELIEVE THAT THE GARNISHEE NAMED IN SECTION (A) BELOW HAS PROPERTY OTHER THAN PERSONAL EARNINGS OWING BY THEM TO SAID JUDGMENT DEBTOR THAT IS NOT EXEMPT UNDER THE LAWS OF THE STATE OF OHIO AND THE UNITED STATES . . . .

(*See* doc. #17 ex. A.) In aid of garnishment of Ms. Williams' account at Provident Bank, Mr. Wiseman submitted to the Hamilton County court a partially-completed form similar to that completed by Mr. Rohner, including nearly identical language in the affidavit section signed by Mr. Wiseman. (*See id.* ex. B.) Plaintiffs allege that Weltman had no factual basis for a belief that Mr. Todd's account contained non-exempt assets, that Mr. Wiseman had no factual basis for a belief that Ms. Williams' bank account contained non-exempt assets, that no judgment debtor examination preceded the signing of the affidavits, and that Defendants undertook no discovery to inquire whether the monies in Plaintiffs' savings accounts were exempt.

Upon the filing of each of these affidavits, the Municipal Court issued an order of garnishment, and Plaintiffs' respective banks debited money from their accounts. The forms completed by Defendants each include a section entitled "Court Order and Notice of Garnishment." (*See id.* exs. A, B.) This section includes the language provided for in Ohio Revised Code section 2716.13(B), stating, *inter alia*, that

> THE JUDGMENT CREDITOR IN THE ABOVE CASE HAS FILED AN AFFIDAVIT, SATISFACTORY TO THIS COURT, STATING THAT YOU HAVE MONEY, PROPERTY, OR CREDITS, OTHER THAN PERSONAL EARNINGS, IN YOUR HANDS OR UNDER YOUR CONTROL THAT BELONG TO THE JUDGMENT DEBTOR AND THAT SOME OF THE MONEY, PROPERTY, OR CREDITS MAY NOT BE EXEMPT FROM GARNISHMENT UNDER THE LAWS OF OHIO OR THE UNITED STATES.

(*Id.* ex. A. *See also id.* ex. B.) The form order also contains language ordering the garnishee (in these cases, Fifth Third Bank or Provident Bank) to complete the "Answer of the Garnishee" section of the form and to return it and the proper amount of money to the clerk of the court. After completing and filing such a form, the garnishee must deliver a copy to the judgment debtor. *See* Ohio Rev. Code § 2716.13(B). A Municipal Court judge signed the order portion of the forms submitted by Weltman and Mr. Wiseman, and those forms were filed in Hamilton County Municipal Court.[2] According to the Amended Complaint, the entire amount garnished from Mr. Todd's account was exempt from garnishment, since it consisted of Mr. Todd's S.S.I. payments and his wife's short-term disability funds.

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[2] In the copies of the form attached as Exhibits A and B to the Amended Complaint, the signature line for the Municipal Court judge is blank. However, the form states that the judge's signature is found only on the "original." An examination of docket sheets found on the Hamilton County Clerk of Courts' website (www.courtclerk.org) indicates that a Municipal Court judge did sign the orders prior to the filing of the forms in the garnishment actions against Plaintiffs. Additionally, at least Mr. Todd appears to concede in his brief that a judge signed the order portion of the form attached to the Amended Complaint as Exhibit A. (*See* doc. #59 at 4.)

Ms. Williams also alleges that the funds in her account were exempt since her sole source of income was S.S.I. payments. Mr. Todd filed a request for garnishment hearing, but Ms. Williams did not. The Hamilton County Municipal Court ordered that the funds be returned to Mr. Todd, dismissed those proceedings, and released the garnishee.[3]

Plaintiffs bring this action pursuant to the FDCPA, alleging that Defendants' filing of the affidavits in aid of garnishment with no factual basis for a belief that Plaintiffs' bank accounts contained non-exempt assets constituted violations of 15 U.S.C. §§ 1692e and 1692f. Section 1692e provides in relevant part that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Under § 1692f, "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt."

III. ANALYSIS

Weltman and Mr. Wiseman have each filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Defendants argue that: 1) under the *Rooker-Feldman* doctrine, the Court lacks subject matter jurisdiction to hear Plaintiffs' claims, 2) Plaintiffs' claims are barred by res judicata or collateral estoppel, 3) the doctrine of witness immunity prevents

[3] In their Amended Complaint, Plaintiffs do not address whether they requested hearings. The information pertaining to this issue was garnered from the docket sheets in Plaintiffs' garnishment cases, one of which is attached to Weltman's motion and both of which are available on the Hamilton County Clerk of Courts' website.

Plaintiffs from succeeding on their claims, and 4) Plaintiffs' allegations do not support a claim under the FDCPA. The Court first addresses the issue of subject matter jurisdiction, as a federal court must satisfy itself of its jurisdiction over the subject matter of a case before it considers the merits of a case. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101-02 (1998).

A. Rooker-Feldman

The *Rooker-Feldman* doctrine takes its name from two Supreme Court cases. In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), the Supreme Court explained that lower federal courts lack jurisdiction to hear appeals from state court judgments because the Supreme Court alone has that power. The Court broadened this rule in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 486, 483 n.16 (1983), by holding that lower federal courts lack jurisdiction to hear "challenges to state court decisions in particular cases arising out of judicial proceedings" or to decide questions "inextricably intertwined" with state court judgments. These two decisions form the basis of a doctrine that now bears their name. *See generally* Symposium, *The Rooker-Feldman Doctrine,* 74 Notre Dame L. Rev. 1081 (1999). Justice Marshall, concurring in *Penzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 25 (1987), defined "inextricably intertwined" as follows:

> [I]t is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issue before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the

> federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

"In practice this means that when granting relief on the federal claim would imply that the state-court judgment on the other issues was incorrect, federal courts do not have jurisdiction. . . ." *Pieper v. Am. Arbitration Ass'n, Inc.*, 336 F.3d 458, 460 (6th Cir. 2003), *cert. denied*, 124 S. Ct. 1420 (2004). Defendants argue that the *Rooker-Feldman* doctrine precludes this Court from addressing the merits of Plaintiffs' claims because granting relief on those claims would undermine the Hamilton County Municipal Court's findings that the affidavits in question were valid and satisfactory, as well as the Municipal Court's orders based on those findings.

Plaintiffs claim that Weltman and Mr. Wiseman violated the FDCPA when they filed affidavits stating that they had a reason to believe that Plaintiffs had non-exempt assets in their bank accounts, without having a basis for any such belief. Under their theory, Plaintiffs may prevail on their claims regardless of whether they in fact had non-exempt assets in the relevant accounts, as long as Plaintiffs can prove that, at the time they filed their affidavits, Defendants had no basis for stating that they believed that Plaintiffs had non-exempt assets. Defendants argue that *Rooker-Feldman* bars Plaintiffs' claims because granting Plaintiffs relief on their claims would undermine the Municipal Court's findings that the affidavits are "satisfactory to this court." However, on the Amended Complaint and the state court records before it, the Court cannot say that the Municipal Court's statement, pursuant to the statutory form order, that the affidavits were "satisfactory" evinces a conclusion by the

Municipal Court that the affidavits were factually accurate. There is no indication in the Amended Complaint, the state court documents, or the statutory provisions establishing garnishment procedures that Municipal Court judges make any determination as to the factual accuracy of an affidavit submitted pursuant to Ohio Revised Code section 2716.11 prior to signing the section 2716.13(B) order. Rather, a section 2716.13(B) order "involve[s] only a preliminary determination not going to the merits of whether the property was subject to garnishment." *Fifth Third Bank of Columbus, Inc. v. Bowman*, No. 89AP-515, 1990 WL 12379, at *3 (Ohio Ct. App. Feb. 13, 1990). Thus, success by Plaintiffs on their claims would not undermine the state court's findings that the affidavits were "satisfactory" and that garnishment could proceed.

The Seventh Circuit's decision in *Long v. Shorebank Development Corp.*, 182 F.3d 548 (7th Cir. 1999), is instructive. There, the plaintiff claimed, *inter alia*, that a creditor violated the FDCPA's prohibitions against falsely representing the character, amount and legal status of a debt by presenting her with notice and a complaint that falsely stated that she owed the creditor money. Although the plaintiff also challenged the correctness of the eviction order that was issued based on that same complaint, the panel held that the plaintiff's FDCPA claim based on the false representations to her was not barred by *Rooker-Feldman* because the alleged FDCPA violations were "independent of and complete prior to the entry of the eviction order." *Id.* at 556. "It makes no difference that Long may also deny the correctness of the eviction order in pursuing these claims," explained the court. *Id.* Similarly, here, the sole action forming the basis of Plaintiffs' FDCPA

claims, the filing of a false affidavit, was complete before the state court took any action.

Additionally, while the Sixth Circuit has not addressed the issue squarely, other circuits have concluded that *Rooker-Feldman* does not apply "where federal plaintiffs have not been given a reasonable opportunity to raise their federal claims in the state proceedings." *See Simes v. Huckabee,* 354 F.3d 823, 827 (8th Cir. 2004) (citing cases). *See also Peterson Novelties, Inc. v. City of Berkley,* 305 F.3d 386, 393 (6th Cir. 2002) (noting without question district court's application of rule that *Rooker-Feldman* applies "where the party against whom the doctrine is being applied had the opportunity to raise the issue [in] a prior state court proceeding, and the issue was adjudicated in the prior state court proceeding") (citation and quotation marks omitted); *In re Stoddard,* 248 B.R. 111, 121 (Bankr. N.D. Ohio 2000) (*Rooker-Feldman* does not apply if "there was no reasonable opportunity to raise the claim at issue"). Ohio law provides that any hearing on the garnishment "will be limited to a consideration of the amount of [the judgment debtor's] money, property, or credits, other than personal earnings, in the possession or control of the garnishee, if any, that can be used to satisfy all or part of the judgment you owe to the judgment creditor." Ohio Rev. Code § 2716.13(C)(1)(a). The law does not authorize debtors to raise in a hearing challenging the garnishment any issue as to whether the affiant had a sufficient basis for filing an affidavit in support of garnishment. In fact, an Ohio appellate court has held that while such an affidavit is a prerequisite to initiation of a garnishment proceeding, Ohio law does not require the

affiant to have personal knowledge[4] about the sought-after funds and thus ordinarily the affiant's testimony is irrelevant and the court may properly refuse to allow the debtor to cross-examine the affiant about her affidavit in a hearing challenging the garnishment. *See Bowman,* 1990 WL 12379, at *2-4. While they might have argued within the constraints of the state garnishment proceedings that their funds were exempt, such arguments would have touched upon the alleged falsity of Defendants' affidavits, the issue at the heart of Plaintiffs' FDCPA claim, "only tangentially." *Long,* 182 F.3d at 559. Plaintiffs certainly could not have sought the fully panoply of remedies afforded by the FDCPA, which may include attorney's fees and monetary damages beyond actual damages. *See* 15 U.S.C. § 1692k. Thus, Plaintiffs' FDCPA claims encompass much more than the issues that might have been brought before the state court in the garnishment proceedings. *See Long,* 182 F.3d at 559 (citing remedies available under the FDCPA as reason why state court eviction order does not bar FDCPA claim under *Rooker-Feldman*). In short, Plaintiffs could not have raised their FDCPA claims, or even sought to prove the factual predicates of those claims, in the state court action. Therefore, the Court cannot conclude that Plaintiffs' FDCPA claims are "inextricably intertwined" with a state court judgment and will not decline to exercise jurisdiction.

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[4] Although the affidavit language provided by statute and employed by Defendants does not indicate that the affidavit [sic] has personal knowledge, that does not mean that Plaintiffs' claims, predicated on an allegation that the affidavits are false, necessarily fail. The affidavit language does provide that the affiant "has good reason to believe and does believe" what he says in the affidavit, and Plaintiffs allege that Defendants had no basis for believing that Plaintiffs' accounts had non-exempt assets.

B. Res Judicata and Collateral Estoppel

Defendants make related arguments based on res judicata, or claim preclusion, and collateral estoppel, or issue preclusion. Generally, claim preclusion refers to the effect of a judgment in foreclosing litigation of a claim that has not been litigated, but should have been advanced in an earlier suit, while issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been actually litigated and decided. *See In re Fordu*, 201 F.3d 693, 703 (6th Cir. 1999) (citing *Migra v. Warren City Sch. Dist. Ed. of Educ.*, 465 U.S. 75, 77 n.1 (1984)). Under Ohio law,[5] claims are not precluded under the doctrine of claim preclusion unless those claims were or could have been litigated in a prior action. *See Hapgood v. City of Warren*, 127 F.3d 490, 493 (6th Cir. 1997). Because, as explained *supra*, Plaintiffs could not have raised their FDCPA claims, or any other claims based on the alleged falsity of Defendants' affidavits, in the Ohio garnishment proceedings, those claims are not barred by the doctrine of claim preclusion.

Under the doctrine of issue preclusion, "if an issue of fact or law actually is litigated and determined by a valid and final judgment, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Hicks v. De La Cruz*, 369 N.E.2d 776, 777 (Ohio 1977). Defendants argue that Plaintiffs cannot succeed on their claims because the Municipal Court has already determined that the Defendants' affidavits were

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[5] In determining what preclusive effect to give a state court judgment, a federal court must look to the state court's preclusion rules. *See Hapgood v. City of Warren*, 127 F.3d 490, 493 (6th Cir. 1997).

not false. However, for the reasons set forth in its discussion of *Rooker-Feldman, supra,* the Court cannot conclude that the Municipal Court actually and necessarily decided that averments that Defendants made in the affidavits were factually true when they found that the affidavits were "satisfactory to this court" and issued orders of garnishment. Plaintiffs' claims are therefore not barred by the doctrines of claim or issue preclusion.

C. Witness Immunity

Next, Defendants argue that Plaintiffs' claims against them are barred by the doctrine of witness immunity. In *Briscoe v. LaHue,* 460 U.S. 325 (1983), the Supreme Court concluded that the Civil Rights Act of 1871 (codified at 42 U.S.C. § 1983) did not abrogate the English common law doctrine providing that parties and witnesses were immune from subsequent damages liability for their testimony in judicial proceedings. Consequently, the Court held that § 1983 did not authorize a claim for damages against a police officer for giving perjured testimony at a criminal trial. *See id.* at 340-41. The basis for the common law doctrine was that "in damages suits against witnesses, 'the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible.'" *Id.* at 332-33 (quoting *Calkins v. Sumner,* 13 Wis. 193, 197 (1860)). Without immunity from damages, witnesses might be reluctant to testify, and those witnesses who do testify might shade their testimony to avoid liability. *See id.* at 333. *Briscoe* has been cited by the Sixth Circuit, albeit in a similar case about allegedly false testimony by police officers in a criminal

proceeding, for the general proposition that "[i]t is well-settled that witnesses are granted absolute immunity from suit for all testimony provided in judicial proceedings." *Spurlock v. Satterfield,* 167 F.3d 995, 1001 (6th Cir. 1999). It appears, however, that the Sixth Circuit has applied this doctrine infrequently, if at all, to immunize from suit witnesses other than police officers or other government officials.[6]

The rationales behind the common law witness immunity doctrine do not support affording Defendants witness immunity for their alleged actions here. In this context, there is little fear that "witnesses" such as Messrs. Rohner and Wiseman will fail to come forward to file affidavits in support of garnishment. Plaintiffs allege that Messrs. Rohner and Wiseman had no first-hand knowledge of the subject of their affidavits when they filed them. Moreover, the affidavits themselves do not purport to be based on personal knowledge. Thus, Messrs. Rohner and Wiseman are not first-hand witnesses whose failure to offer information would obstruct the "ascertainment of truth," but, rather, are attorneys acting as representatives and therefore are fungible. Additionally, the Court need not be concerned that "witnesses" such as these will shade their testimony to avoid liability, as the testimony in question is Messrs. Rohner and Wiseman's completion of a

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[6] Additionally, the Supreme Court has excluded from this doctrine testimony by "complaining witnesses," such as a police officer who submits an affidavit in support of an arrest warrant application. *See Malley v. Briggs,* 475 U.S. 335, 340-41 (1986). The Court's reasoning was that when the Civil Rights Act was enacted in 1871, "the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." *See id.*

form affidavit. Thus, on the facts alleged, the Court finds that Defendants are not immune from suit on the basis of the witness immunity doctrine.[7]

D. Applicability of the FDCPA

Defendants also seek dismissal on the ground that Plaintiffs' allegations do not state a claim under the FDCPA. First, Mr. Wiseman argues that the FDCPA does not apply to documents filed in civil actions. However, the cases that he cites for this proposition hold merely that a summons and complaint cannot constitute "the initial communication with a consumer" triggering notice requirements under 15 U.S.C. § 1692g.[8] Even to the extent that these opinions are helpful in interpreting the term "communication" as used throughout the FDCPA, adoption of these cases' reasoning would not necessarily doom Plaintiffs' claims under §§ 1692e and 1692f, since those sections do not explicitly require a "communication" to establish a violation.

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[7] Defendants cite *Beck v. Codilis & Stawiarski, P.A.*, No. 4:99cv485-RH, 2000 U.S. Dist. LEXIS 22440, at *17-21 (N.D. Fla. Dec. 26, 2000) and *Etapa v. Asset Acceptance Corp.*, Civil Action No. 03-86-KSF (E.D. Ky. April 29, 2004), in which district courts applied the witness immunity doctrine to dismiss FDCPA claims based on facts similar to those before the Court here. Those opinions are not controlling authority, however, and, as the Court finds the rationale for giving witnesses immunity from suit inapplicable to this case, the Court declines to follow those opinions' holdings.

[8] *See Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003); *McKnight v. Benitez*, 176 F. Supp. 2d 1301, 1308 (M.D. Fla. 2001). Moreover, a judge of this Court has held that a summons and complaint can constitute an "initial communication" under § 1692g. *See Sprouse v. City Credits Co.*, 126 F. Supp. 2d 1083, 1089 n.8 (S.D. Ohio 2000) (Rice, J.).

Defendants also raise arguments particular to Plaintiffs' claims under § 1692e, which establishes a violation for the use of false, deceptive or misleading representations in the collection of a debt. Courts disagree whether the legislative history of the FDCPA[9] indicates that Congress intended § 1692e to create liability only for misrepresentations made to a debtor, not misrepresentations made to a court of law. *Compare Kropelnicki v. Siegel,* 290 F.3d 118, 127-28 (2d Cir. 2002) (questioning in dicta the tenability of liability under § 1692e based on misrepresentations made to a debtor's attorney since, "[w]here an attorney is interposed as an intermediary between a debt collector and a consumer, we assume the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior") *with Beck v. Codilis & Stawiarski, P.A.,* No. 4:99cv485-RH, 2000 U.S. Dist. LEXIS 22440, at *17 (N.D. Fla. Dec. 26, 2000) (law firm violated § 1692e when it submitted false affidavits regarding fees to court, but plaintiffs cannot recover because defendant attorneys protected by witness immunity). Forbidding debt collectors from making false statements to courts accords with the FDCPA's purpose of protecting consumers from unfair and harassing debt collection practices. Additionally, under the Ohio statutory garnishment scheme, once the garnishee completes its section of the order of garnishment form, which includes the debt collector's affidavit, it is distributed to the debtor, who may be misled by statements about non-exempt assets contained therein. Therefore, the Court will not

[9] The purpose of the Act was "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." S. Rep. 95-382, at 1 (1997), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696.

grant Defendants judgment on the pleadings on Mr. Todd and Ms. Williams' claims under § 1692e.

Plaintiffs also seek relief under § 1692f, which guards against unfair and unconscionable conduct in the collection of a debt.[10] Defendants cite *Wilson v. Business & Professional Credit Management,* No. CV85-L-709, 1986 U.S. Dist. LEXIS 31002 (D. Neb. Aug. 26, 1986), for the proposition that initiating garnishment proceedings pursuant to state law against a person who has only exempt assets cannot itself constitute a violation of any section of the FDCPA, let alone constitute unfair or unconscionable conduct prohibited under § 1692f. In that case,

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[10] In particular, Plaintiffs allude to § 1692f(1), which specifies that "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law" is a violation of the subsection. The subsection is written in the disjunctive – collection is prohibited *unless* the agreement expressly authorizes the amount *or* the amount is permitted by law. Thus, under the plain language of the statute, collection of both amounts expressly authorized by a loan agreement, as well as *additional* amounts as permitted by law, does not contravene § 1692f(1). *See also* 53 Fed. Reg. 50,107-08 (§ 1692f(1) meant to proscribe only the addition of fees, interest, and other charges that were not authorized by the debtor or the law). Plaintiffs do not argue that the amounts that Defendants sought to collect were anything other than that amount borrowed plus interest allowed under the loan agreements in question. Thus, Plaintiffs have not alleged actions that would constitute a violation of subsection 1692f(1) because the amounts that Defendants sought to collect were undoubtedly "expressly authorized by the agreement creating the debt." Therefore, whether the collection of funds exempt from garnishment by statute is "permitted by law" is not relevant. Plaintiffs consequently cannot obtain relief on their allegations under § 1692f(1). By the statute's terms, however, the enumeration of specific instances of "unfair and unconscionable" conduct does not limit the application of § 1692f's general prohibition against using "unfair or unconscionable means to collect or attempt to collect any debt."

the district court dismissed the plaintiff's claims that the defendants' initiation of garnishment proceedings was unfair and unconscionable in violation of § 1692f. The court found that the first garnishment did not violate the Act because under Nebraska law a debtor's examination was unavailable until the first garnishment was quashed such that the defendants could not have known that defendants' assets were exempt. *See id.* at *13-14. Unlike Nebraska law, however, Ohio law permits a judgment debtor's examination prior to the filing of garnishment proceedings. *See* Ohio Rev. Code § 2333.09. The district court in *Wilson* also rejected the claim that a second garnishment attempt, where a judgment debtor's examination was available, violated the FDCPA but grounded that decision on evidence that the defendants had a basis for believing that nonexempt funds were deposited in the debtors' account. *See Wilson,* 1986 U.S. Dist. LEXIS 31002, at *14-15. Here, on the facts alleged in the Amended Complaint, Defendants had no such basis for belief.

Defendants protest that they cannot be liable for following the garnishment procedures set forth by the Ohio statute, which requires the filing of the affidavits in question in order to initiate garnishment proceedings. However, Ohio law does not require every attorney who is asked by a client to initiate garnishment proceedings to swear to such an affidavit regardless of whether the attorney has any basis for making the statements contained in such an affidavit. Discovery may show that Messrs. Rohner and Wiseman had sufficient bases for making the attestations such that their actions were not "unfair" or "unconscionable." Taking the allegations in the Amended Complaint in the light most favorable to the Plaintiffs, however, Messrs. Rohner and Wiseman had no

basis for making these attestations. Without any authority that filing a false affidavit concerning a debtor's assets in initiation of a garnishment proceeding is not "unfair" or "unconscionable," giving rise to liability under § 1692f – and indeed, such an action could easily meet the ordinary definition of "unfair" – the Court will not grant judgment on the pleadings to Defendants on Plaintiffs' § 1692f claims.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** both the Motion of Defendant Mark N. Wiseman for Judgment on the Pleadings (doc. #40) and the Motion of Defendant[] Weltman, Weinberg & Reis, Co., L.P.A., for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c) (doc. #55).

IT IS SO ORDERED.

s/ Susan J. Dlott
Susan J. Dlott
United States District Judge

No. 04-4109

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT TODD ET AL.,	)	
Plaintiff-Appellee,	)	
v.	)	**ORDER**
WELTMAN, WEINBERG & REIS CO., L.P.A.,	)	(Filed Apr. 24, 2006
Defendant-Appellant,	)	
MARK N. WISEMAN,	)	
Defendant.	)	

BEFORE: CLAY and COOK, Circuit Judges; and JULIAN COOK,* **District Judge.**

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were

* Hon. Julian A. Cook, Jr., Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

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15 U.S.C. § 1692 (2005). Congressional findings and declaration of purpose

(a) Abusive practices. There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws. Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods. Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce. Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes. It is the purpose of this title [15 USCS §§ 1692 et seq.] to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

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15 U.S.C. § 1692a (2005). Definitions

As used in this title [15 USCS §§ 1692 et seq.] –

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 808(6) [15 USCS § 1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include –

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

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15 U.S.C. § 1692e (2005). False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of –

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to –

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this title [15 USCS §§ 1692 et seq.].

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is

from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 603(f) of this Act [15 USCS § 1681a(f)]

15 U.S.C. § 1692f (2005). Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if –

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§ 2715.11 Service of garnishee. (GC §§ 11828, 11833)

When the plaintiff, his agent, or attorney makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation named in the affidavit has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishees a copy of the order of attachment, with a written notice that he appear in court and answer, as provided in section 2715.29 of the Revised Code. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or he personally served.

If the garnishee is a person, a copy of the order and notice shall be served upon him personally, or left at his usual place of residence. When a partnership is garnished by its company name, a copy of the order and notice shall be left at its usual place of doing business, or with a member of such partnership. If the garnishee is a corporation, a copy of the order and notice shall be left with the president or other principal officer of the corporation or with its secretary, cashier, or managing agent. If such corporation is a railroad company, a copy of the order and notice may be left with a regular ticket or freight agent thereof, in any county in which the railroad is located.

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§ 2716.11 Commencement of proceeding for garnishment of property.

A proceeding for garnishment of property, other than personal earnings, may be commenced after a judgment has been obtained by a judgment creditor by the filing of an affidavit in writing made by the judgment creditor or

the judgment creditor's attorney setting forth all of the following:

(A) The name of the judgment debtor whose property, other than personal earnings, the judgment creditor seeks to garnish;

(B) That the affiant has good reason to believe and does believe that the person named in the affidavit as the garnishee may have property, other than personal earnings, of the judgment debtor that is not exempt under the law of this state or the United States;

(C) A description of the property.

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§ 2716.13. Scheduling of hearing; notice to garnishee and judgment debtor, request for hearing

(A) Upon the filing of a proceeding in garnishment of property, other than personal earnings, under *section 2716.11 of the Revised Code,* the court shall cause the matter to be set for hearing within twelve days after that filing.

(B) Upon the scheduling of a hearing relative to a proceeding in garnishment of property, other than personal earnings, under division (A) of this section, the clerk of the court immediately shall issue to the garnishee three copies of the order of garnishment of property, other than personal earnings, and of a written notice that the garnishee answer as provided in *section 2716.21 of the Revised Code* and the garnishee's fee required by *section 2716.12 of the Revised Code.* The copies of the order and of the notice shall be served upon the garnishee in the same manner as a summons is served. The copies of the order

and of the notice shall not be served later than seven days prior to the date on which the hearing is scheduled. The order shall bind the property, other than personal earnings, of the judgment debtor in the possession of the garnishee at the time of service.

The order of garnishment of property, other than personal earnings, and notice to answer shall be in substantially the following form:

"ORDER AND NOTICE OF GARNISHMENT OF PROPERTY OTHER THAN PERSONAL EARNINGS AND ANSWER OF GARNISHEE

Docket No. . . . . .

Case No. . . . . .

In the. . . . . .Court

. . . . . ., Ohio

The State of Ohio
County of . . . . . ., ss
. . . . . ., Judgment Creditor
vs.
. . . . . ., Judgment Debtor

SECTION A. COURT ORDER AND NOTICE OF GARNISHMENT

To: . . . . . , Garnishee

The judgment creditor in the above case has filed an affidavit, satisfactory to the undersigned, in this Court stating that you have money, property, or credits, other than personal earnings, in your hands or under your control that belong to the judgment debtor, and that some of the money, property, or credits may not be exempt from

garnishment under the laws of the State of Ohio or the laws of the United States.

You are therefore ordered to complete the "ANSWER OF GARNISHEE" in section (B) of this form. Return one completed and signed copy of this form to the clerk of this court together with the amount determined in accordance with the "ANSWER OF GARNISHEE" by the following date on which a hearing is tentatively scheduled relative to this order of garnishment: . . . . . Deliver one completed and signed copy of this form to the judgment debtor prior to that date. Keep the other completed and signed copy of this form for your files.

The total probable amount now due on this judgment is $ . . . . . The total probable amount now due includes the unpaid portion of the judgment in favor of the judgment creditor, which is $ . . . . . ; interest on that judgment and, if applicable, prejudgment interest relative to that judgment at the rate of . . . . . % per annum payable until that judgment is satisfied in full; and court costs in the amount of $ . . . . .

You also are ordered to hold safely anything of value that belongs to the judgment debtor and that has to be paid to the court, as determined under the "ANSWER OF GARNISHEE" in section (B) of this form, but that is of such a nature that it cannot be so delivered, until further order of the court.

Witness my hand and the seal of this court this . . . . . day of . . . . . , ...

. . . . . .

Judge

SECTION B. ANSWER OF GARNISHEE

Now comes . . . . . the garnishee, who says:

1. That the garnishee has money, property, or credits, other than personal earnings, of the judgment debtor under the garnishee's control and in the garnishee's possession.

. . . . .	. . . . .	. . . . .
yes	no	if yes, amount

2. That property is described as:

3. If the answer to line 1 is "yes" and the amount is less than the probable amount now due on the judgment, as indicated in section (A) of this form, sign and return this form and pay the amount of line 1 to the clerk of this court.

4. If the answer to line 1 is "yes" and the amount is greater than that probable amount now due on the judgment, as indicated in section (A) of this form, sign and return this form and pay that probable amount now due to the clerk of this court.

5. If the answer to line 1 is "yes" but the money, property, or credits are of such a nature that they cannot be delivered to the clerk of the court, indicate that by placing an "X" in this space: . . . . . Do not dispose of that money, property, or credit or give them to anyone else until further order of the court.

6. If the answer to line 1 is "no," sign and return this form to the clerk of this court.

I certify that the statement above are true.

. . . . . .

(Print Name of Garnishee)

. . . . . .

(Print Name and Title of Person

Who Completed Form)

Signed . . . . . .

(Signature of Person Completing Form)

Dated this . . . . . day of . . . . . , ... "

Section A of the form described in this division shall be completed before service. Section B of the form shall be completed by the garnishee, and the garnishee shall file one completed and signed copy of the form with the clerk of the court as the garnishee's answer. The garnishee may keep one completed and signed copy of the form and shall deliver the other completed and signed copy of the form to the judgment debtor.

If several affidavits seeking orders of garnishment of property, other than personal earnings, are filed against the same judgment debtor in accordance with *section 2716.11 of the Revised Code,* the court involved shall issue the requested orders in the same order in which the clerk received the associated affidavits.

(C)(1) At the time of the filing of a proceeding in garnishment of property, other than personal earnings, under *section 2716.11 of the Revised Code,* the judgment creditor also shall file with the clerk of the court a praecipe instructing the clerk to issue to the judgment debtor a notice to the judgment debtor form and a request for hearing form. Upon receipt of the praecipe and the scheduling of a hearing relative to an action in garnishment of property, other than personal earnings, under division (A) of this section, the clerk of the court immediately shall serve upon the judgment debtor, in

accordance with division (D) of this section, two copies of the notice to the judgment debtor form and of the request for hearing form. The copies of the notice to the judgment debtor form and of the request for hearing form shall not be served later than seven days prior to the date on which the hearing is scheduled.

(a) The notice to the judgment debtor that must be served upon the judgment debtor shall be in substantially the following form:

"(Name and Address of the Court)
(Case Caption) . . . . . Case No . . . . .

NOTICE TO THE JUDGMENT DEBTOR

You are hereby notified that this court has issued an order in the above case in favor of (name and address of judgment creditor), the judgment creditor in this proceeding, directing that some of your money, property, or credits, other than personal earnings, now in the possession of (name and address of garnishee), the garnishee in this proceeding, be used to satisfy your debt to the judgment creditor. This order was issued on the basis of the judgment creditor's judgment against you that was obtained in (name of court) in (case number) on (date). Upon your receipt of this notice, you are prohibited from removing or attempting to remove the money, property, or credits until expressly permitted by the court. Any violation of this prohibition subjects you to punishment for contempt of court.

The law of Ohio and the United States provides that certain benefit payments cannot be taken from you to pay a debt. Typical among the benefits that cannot be attached or executed upon by a creditor are the following:

(1) Workers' compensation benefits;

(2) Unemployment compensation payments;

(3) Cash assistance payments under the Ohio works first program;

(4) Benefits and services under the prevention, retention, and contingency program;

(5) Disability financial assistance administered by the Ohio department of job and family services;

(6) Social security benefits;

(7) Supplemental security income (S.S.I.);

(8) Veteran's benefits;

(9) Black lung benefits;

(10) Certain pensions.

There may be other benefits not included in the above list that apply in your case.

If you dispute the judgment creditor's right to garnish your property and believe that the judgment creditor should not be given your money, property, or credits, other than personal earnings, now in the possession of the garnishee because they are exempt or if you feel that this order is improper for any other reason, you may request a hearing before this court by disputing the claim in the request for hearing form, appearing below, or in a substantially similar form, and delivering the request for hearing to this court at the above address, at the office of the clerk of this court no later than the end of the fifth business day after you receive this notice. You may state your reasons for disputing the judgment creditor's right to garnish your property in the space provided on the form; however, you

are not required to do so. If you do state your reasons for disputing the judgment creditor's right, you are not prohibited from stating any other reason at the hearing. If you do not state your reasons, it will not be held against you by the court, and you can state your reasons at the hearing. NO OBJECTIONS TO THE JUDGMENT ITSELF WILL BE HEARD OR CONSIDERED AT THE HEARING. If you request a hearing, the hearing will be limited to a consideration of the amount of your money, property, or credits, other than personal earnings, in the possession or control of the garnishee, if any, that can be used to satisfy all or part of the judgment you owe to the judgment creditor.

If you request a hearing by delivering your request for hearing no later than the end of the fifth business day after you receive this notice, it will be conducted in . . . . . courtroom . . . . . , (address of court), at . . . . m. on . . . . , ... You may request the court to conduct the hearing before this date by indicating your request in the space provided on the form; the court then will send you notice of any change in the date, time, or place of the hearing. If you do not request a hearing by delivering your request for a hearing no later than the end of the fifth business day after you receive this notice, some of your money, property, or credits, other than personal earnings, will be paid to the judgment creditor.

If you have any questions concerning this matter, you may contact the office of the clerk of this court. If you want legal representation, you should contact your lawyer immediately. If you need the name of a lawyer, contact the local bar association.

. . . . . .

Clerk of the Court

. . . . . .

Date"

(b) The request for hearing form that must be served upon the judgment debtor shall have attached to it a postage-paid, self-addressed envelope or shall be on a postage-paid self-addressed postcard, and shall be in substantially the following form:

"(Name and Address of Court)
Case Number . . . . . Date . . . . .

REQUEST FOR HEARING

I dispute the judgment creditor's right to garnish my money, property, or credits, other than personal earnings, in the above case and request that a hearing in this matter be held . . . . . .

(Insert "on" or "earlier than")

the date and time set forth in the document entitled "NOTICE TO THE JUDGMENT DEBTOR" that I received with this request form.

I dispute the judgment creditor's right to garnish my property for the following reasons:

. . . . . .

(Optional)

. . . . . .

. . . . . .

I UNDERSTAND THAT NO OBJECTIONS TO THE JUDGMENT ITSELF WILL BE HEARD OR CONSIDERED AT THE HEARING.

. . . . . .

(Name of Judgment Debtor)

. . . . . .

(Signature)

. . . . . .

(Date)

WARNING: IF YOU DO NOT DELIVER THIS REQUEST FOR HEARING OR A REQUEST IN A SUBSTANTIALLY SIMILAR FORM TO THE OFFICE OF THE CLERK OF THIS COURT WITHIN FIVE (5) BUSINESS DAYS OF YOUR RECEIPT OF IT, YOU WAIVE YOUR RIGHT TO A HEARING AND SOME OF YOUR MONEY, PROPERTY, OR CREDITS, OTHER THAN PERSONAL EARNINGS, NOW IN THE POSSESSION OF (GARNISHEE'S NAME) WILL BE PAID TO (JUDGMENT CREDITOR'S NAME) TO SATISFY SOME OF YOUR DEBT TO (JUDGMENT CREDITOR'S NAME)."

(2) The judgment debtor may receive a hearing in accordance with this division by delivering a written request for hearing to the court within five business days after receipt of the notice provided pursuant to division (C)(1) of this section. The request may set forth the judgment debtor's reasons for disputing the judgment creditor's right to garnish the money, property, or credits, other than personal earnings; however, neither the judgment debtor's inclusion of nor failure to include those reasons upon the request constitutes a waiver of any defense of the

judgment debtor or affects the judgment debtor's right to produce evidence at the hearing. If the request is made by the judgment debtor within the prescribed time, the hearing shall be limited to a consideration of the amount of money, property, or credits, other than personal earnings, of the judgment debtor in the hands of the garnishee, if any, that can be used to satisfy all or part of the debt owed by the judgment debtor to the judgment creditor. If a request for a hearing is not received by the court within the prescribed time, the hearing scheduled pursuant to division (A) of this section shall be canceled unless the court grants the judgment debtor a continuance in accordance with division (C)(3) of this section.

(3) If the judgment debtor does not request a hearing in the action within the prescribed time pursuant to division (C)(2) of this section, the court nevertheless may grant a continuance of the scheduled hearing if the judgment debtor, prior to the time at which the bearing was scheduled, as indicated on the notice to the judgment debtor required by division (C)(1) of this section, establishes a reasonable justification for failure to request the hearing within the presented time. If the court grants a continuance of the hearing, it shall cause the matter to be set for hearing as soon as practicable thereafter. The continued hearing shall be conducted in accordance with division (C)(2) of this section.

(4) The court may conduct the hearing on the matter prior to the time at which the hearing was scheduled, as indicated on the notice to the judgment debtor required by division (C)(1) of this section, upon the request of the judgment debtor. The parties shall be sent notice, by the clerk of the court, by regular mail, of any change in the date, time, or place of the hearing.

(5) If the scheduled hearing is canceled and no continuance is granted, the court shall issue an order to the garnishee to pay all or some of the money, property, or credits, other than personal earnings, of the judgment debtor in the possession of the garnishee at the time of service of the notice and order into court if they have not already been paid to the court. This order shall be based on the answer of the garnishee filed pursuant to this section. If the scheduled hearing is conducted or if it is continued and conducted, the court shall determine at the hearing the amount of the money, property, or credits, other than personal earnings, of the judgment debtor in the possession of the garnishee at the time of service of the notice and order, if any, that can be used to satisfy all or part of the debt owed by the judgment debtor to the judgment creditor, and issue an order, accordingly, to the garnishee to pay that amount into court if it has not already been paid to the court.

(D) The notice to the judgment debtor form and the request for hearing form described in division (C) of this section shall be sent by the clerk by ordinary or regular mail service unless the judgment creditor requests that service be made in accordance with the Rules of Civil Procedure, in which case the forms shall be served in accordance with the Rules of Civil Procedure. Any court of common pleas that issues an order of garnishment of property, other than personal earnings, under this section has jurisdiction to serve process pursuant to this section upon a garnishee who does not reside within the jurisdiction of the court. Any county court or municipal court that issues an order of garnishment of property, other than personal earnings, under this section has jurisdiction to

serve process pursuant to this section upon a garnishee who does not reside within the jurisdiction of the court.

(2)

No. 06-123

Supreme Court, U.S.
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In The Supreme Court of the United States

WELTMAN, WEINBERG & REIS CO., L.P.A.,
Petitioner,

v.

ROBERT TODD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF OHIO CREDITOR'S ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, Ohio Creditor's Attorneys Association, respectfully submits this brief in support of Petitioner, Weltman, Weinberg & Reis Co., LPA. *Amicus Curiae* files this brief pursuant to Sup. Ct. R. 37.2(a) and has received written consent from both Petitioner and Respondent.

Amicus Curiae encourages the granting of the writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit because the judgment results from an incorrect interpretation and application of the absolute witness immunity rule and the long-standing *Rooker-Feldman* doctrine established by this Court.[1] The Sixth Circuit's judgment is inconsistent with this Court's precedent and with that of other federal circuit courts.[2]

The Ohio Creditor's Attorneys Association is an association of attorneys who practice primarily in the State of Ohio, but who are interested in the proper application of the law and the impact of judicial decisions on all practicing attorneys, particularly in the retail, consumer, and commercial litigation areas. The Ohio Creditor's Attorneys Association's mission is to educate its members and others on the laws, particularly those federal and state laws, impacting on the

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[1]The *Rooker-Feldman* doctrine takes its name from two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[2]Pursuant to Sup. Ct. R. 37.6, *amicus* represents that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* has made a monetary contribution to the preparation and submission of this brief.

practices of creditors' rights, and to actively encourage responsible and appropriate legislation impacting on the retail collection area, including the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. (FDCPA), as well as on the commercial collection area. *Amicus Curiae* believes that, consistent with the Court's precedent, attorneys should be immune from actions for damages for words spoken or written in the course of a judicial proceeding, including postjudgment garnishment proceedings. In contrast, the Sixth Circuit's decision ignores the Court's rule on absolute witness immunity. The Sixth Circuit's decision will specifically expose creditors' attorneys participating on behalf of their clients in postjudgment proceedings to lawsuits, damages, and litigation expenses, and the eroding of the absolute witness immunity rule will likely migrate to other practices of the law and detrimentally impact on the representation of a broad range of clients by attorneys.

Amicus Curiae further specifically believes that the *Rooker-Feldman* doctrine established by this Court must be applied to preclude federal jurisdiction over FDCPA claims inextricably intertwined with a state court decision. In contrast, the Sixth Circuit's decision interprets recent Supreme Court decisions as effectively eliminating the *Rooker-Feldman* doctrine, thus concluding that the federal district court had subject-matter jurisdiction over plaintiff's claim in federal court that he was barred from bringing in state court. The Sixth Circuit's misinterpretation of the *Rooker-Feldman* doctrine, if not reviewed, will lead to an abuse of the federal judicial system, including a significant increase in the number of federal lawsuits brought against creditors' attorneys. Under the Sixth Circuit's decision, any disgruntled state court debtor can use the FDCPA to allege claims arising from issues identical to those in state court in an attempt to get around unsatisfactory state court judgments. Furthermore, the erosion of the *Rooker-Feldman* doctrine will cause a notable

increase in federal court filings generally, as well as confusion over the basic structure of the state and federal court system.

This case offers the Court the significant and timely opportunity to affirm its own precedent establishing the absolute witness immunity rule and the *Rooker-Feldman* doctrine. The Court's review should preclude the Sixth Circuit Court of Appeals from interpreting these two judicial principles in ways that are contrary to long-established and reliable standards and practices.

JURISDICTION

On January 13, 2006, the order of the Sixth Circuit Court of Appeals sought to be reviewed was entered. The court of appeals denied the Petitioner's petition for rehearing and for rehearing en banc on April 24, 2006. The Petition for Writ of Certiorari is timely pursuant to 28 U.S.C. § 2101, and this *Amicus Curiae* in support of the Petition is filed pursuant to Sup. Ct. R. 37. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT ERRED IN BOTH ITS INTERPRETATION AND ITS APPLICATION OF THE ABSOLUTE WITNESS IMMUNITY RULE, WHICH WILL HAVE A DETRIMENTAL CHILLING EFFECT ON HOW ATTORNEYS REPRESENT THEIR CLIENTS' INTERESTS.

The absolute witness immunity rule, and how it is to be applied in the context of a federal statute, was defined and applied by this Court in *Briscoe v. LaHue*, 460 U.S. 325 (1983). This important safeguarding rule has not been overruled and continues to be actively applied and relied upon by judges and

litigants in both state and federal courts. In order for the rule to apply, a court must first determine whether the immunity was established when the particular statute was enacted. Second, the court must decide whether in enacting the statute, the legislature intended to repeal the immunity. To claim immunity, the witness must also demonstrate that he or she was serving a function within the judicial process.

It is well established that postjudgment garnishment and attachment proceedings are part of the judicial process and that an attorney submitting a garnishment affidavit serves an important and legitimate judicial function. *Federal Housing Administration, Region No. 4 v. Burr*, 309 U.S. 242, 246 (1940). It is also well established that courts apply the witness immunity rule to statements made in aid of garnishment and that the rule applies in ex parte proceedings. *See Burns v. County of King*, 883 F.2d 819, 822 (9th Cir. 1989); *Sykes v. James*, 13 F.3d 515 (2d Cir. 1993). Within the postjudgment garnishment context and numerous other contexts, the absolute witness immunity rule is intended to ensure that the judicial system functions unimpeded by fear on the part of witnesses that they will be sued for damages for their role in the judicial process. *Giffin v. Summerlin*, 78 F.3d 1227 (7th Cir. 1996).

The absolute witness immunity rule applies to the factual circumstances in this case. Under Ohio law, to commence a postjudgment garnishment proceeding, the creditor or the attorney for the creditor, which in the instant case was Petitioner Weltman, Weinberg & Reis Co., must file an affidavit stating that "the affiant has a reasonable basis to believe that the person named in the affidavit as the garnishee may have property, other than personal earnings, of the judgment debtor that is not exempt under the law of this state or the United States." Ohio Rev. Code Ann. § 2716.11. In this case, the state court determined that the affidavit was valid and enforceable. Accordingly, the court ordered that the

judgment debtor's bank account be garnished. Later, however, after a hearing on the debtor's motion regarding the status of the garnished funds, the state court determined that the funds were exempt. Neither party appealed the state court's judgment. Instead, in violation of both the absolute witness immunity rule and the *Rooker-Feldman* doctrine, the debtor filed a federal court proceeding seeking damages against the attorney, alleging violations of the FDCPA.

Amici Curiae attorneys who are practicing in the area of creditors' rights reasonably rely on the absolute witness immunity rule, which is frequently applied and is well established after *Briscoe*. The Sixth Circuit's refusal to apply the rule to the instant case will expose all creditors' attorneys to potential lawsuits by disgruntled opponents, which is precisely what the rule was intended to eliminate. Importantly, the Sixth Circuit recognized in its Opinion that the FDCPA did not abrogate the absolute witness immunity rule. Further, the Sixth Circuit agreed that the rule is applicable to testimony presented in affidavit form and that "the form of the witness testimony should not affect the status of the immunity attached thereto." The Sixth Circuit also acknowledged that garnishment proceedings under Ohio law are essentially equipped with probable cause, because such proceedings are brought only *after* a valid judgment has been entered. Yet, in derogation of the basic elements of the absolute witness immunity rule established by the Court, and acknowledging evidence of the elements in the case before it, the Sixth Circuit concluded that in a postjudgment garnishment proceeding, the affiant is a "complaining witness" without immunity. Consequently, it is unclear under the Sixth Circuit's Opinion why the absolute witness immunity rule did not apply where the affidavit testimony was presented in a postjudgment proceeding where probable cause issues were not required, and whether the absolute witness immunity rule *can ever be applied* after the Sixth Circuit's decision.

The Sixth Circuit's decision places the absolute witness immunity rule in serious limbo not only for creditors' attorneys, but for all attorneys who are required to testify in a case. The court's unsubstantiated conclusion that attorneys submitting affidavits required by state statute in postjudgment garnishment proceedings may be exposed to damages claims by opponent debtors will undermine the creditors' attorneys' ability to zealously represent their clients. The ruling specifically exposes creditors' attorneys to unprecedented claims by debtors who are dissatisfied with the outcome of having to pay their debts and by those who will file lawsuits to bring settlement pressure on the underlying debt because it is more expensive to fight the federal action. Other debtors will file lawsuits simply to seek damages from witnesses to cover their debts and fees.

The Sixth Circuit decision will therefore have a chilling effect on creditors' attorneys and ultimately on all attorneys who can no longer reasonably rely on the appropriate judicial protections afforded up until now by the absolute witness immunity rule. What attorney will not now be reluctant to proceed with a postjudgment collection proceeding entailing affidavit testimony prior to commencing a garnishment or attachment proceeding for fear of reprisal by the opposing party in the form of a lawsuit for damages?

The Sixth Circuit's callous dismissal of the chilling effect of its decision is equally disturbing and suggests a more widespread derogation of the absolute witness immunity rule when applied to any attorney, not just creditors' attorneys, in other contexts. The most significant chilling effect will be on the lack of representation available to creditors who seek assistance in recovering on defaulted loans. Just as medical doctors in certain disciplines with high malpractice insurance premiums walk away from the practice, leaving patients with little choice of care, attorneys will be reluctant to practice in areas where witness testimony is likely, for fear of reprisal and

potentially exorbitant additional costs if the absolute witness immunity rule does not apply *or if* there is uncertainty about the application of the absolute witness immunity rule.

Remarkably, the Sixth Circuit assumes that garnishment actions are a profitable business and that any ramifications from a lack of immunity and any additional protections taken by attorneys potentially exposed to unwarranted lawsuits will simply be passed on to the creditor client. To the contrary, pass-through costs of expensive litigation and harassment suits are severely limited in the marketplace. The Sixth Circuit also fails to recognize the detrimental cost lawsuits against attorneys have on an attorney's reputation and goodwill in a community.

The Sixth Circuit's opinion also fails to adequately respond to the fact that the abolition of the absolute witness immunity rule will simply have no beneficial result. That is, the prejudice to creditors' attorneys due to the abolition of the absolute witness immunity rule far outweighs any conceivable benefit the abolition may have. Attorney practice has been successfully regulated through each state bar system and professional rules and disciplinary actions. If a particular party or the court is concerned about aberrant behavior by an attorney, both state courts and federal courts have procedures, such as Fed. R. Civ. P. 11 or the equivalent state sanction rule, for reprimand and sanctions. Clients concerned about their attorneys' decisions or actions may bring common-law malpractice actions or seek redress through the state bar association. Both state and federal judges have discretionary authority to address unprofessional or tortious behavior by attorneys. The Sixth Circuit decision to, at a minimum, carve out an exception to the absolute witness immunity rule and not apply the rule to creditors' attorneys submitting postjudgment garnishment affidavits is not only inconsistent with decisions by this Court and other federal circuits, but it

serves no practical purpose other than to discourage attorneys from practicing in the area of creditors' rights.

Finally, the Sixth Circuit's negative attitude toward creditors' attorneys has no justifiable explanation in the case. It is uncontroverted that the Petitioner fully complied with state law in pursuing its client's rightful claim to have its debts paid. Any improper conduct on the part of the creditors' attorney should have been addressed in state court through the numerous venues available for such complaints. No such action was taken by the debtor, who was only interested in damages relief. Allowing a party to ignore redress in state court and, instead, to seek damages in federal court, where the witness/attorney violated no laws, is a dangerous precedent to allow.

II. THE SIXTH CIRCUIT ERRED IN ITS INTERPRETATION OF *EXXON MOBIL CORP. V. SAUDI BASIC INDUSTRIES CORP.*, AND ERRED IN DISREGARDING THE *ROOKER-FELDMAN* DOCTRINE AND IN ENCOURAGING AN UNPRECEDENTED EXPANSION OF FEDERAL SUBJECT-MATTER JURISDICTION.

The Sixth Circuit's dismissal of the application of the *Rooker-Feldman* doctrine to the factual and legal circumstances of this case is equally as incomprehensible as it is disturbing. Under the *Rooker-Feldman* doctrine, as redefined by *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 293 (2005), a plaintiff may not initiate a federal claim in lieu of pursuing appropriate remedies, claims, or an appeal in state court when the federal claim is "inextricably intertwined" with the final state court judgment. While the federal circuit courts continue to be severely divided on how the *Rooker-Feldman* doctrine should be applied, the Sixth Circuit's decision in this

case does not just narrow *Rooker-Feldman* and expand the reach of federal subject-matter jurisdiction, the decision effectively overrules *Rooker-Feldman*. As such, unless overruled, under the Sixth Circuit decision, dissatisfied state court litigates can simply refile their claim in federal court under the guise of a federal statute and bypass the state court.

It is of grave concern to *Amicus Curiae* that the Sixth Circuit ignored the *Rooker-Feldman* doctrine and allowed the FDCPA to be used as the basis of a federal court claim. The remedy sought in federal court is identical to the remedy sought in the state court action, and the injury alleged in the federal action arises from a state court order. The Ohio state court, pursuant to Ohio statutory law, ordered that the defendant's garnishment affidavit was proper, notwithstanding the fact that the affidavit did not specify that a formal debtor exam had taken place. The seizure of funds thus occurred as a result of the state court garnishment order. Rather than pursuing remedies in state court, the plaintiff subsequently sought relief in federal court, using the FDCPA as a vehicle to file a federal claim, and asked the federal court to essentially declare that the state court order was improper and to award plaintiff damages. Even taking into account the recent limitations to the *Rooker-Feldman* doctrine, the fundamental precepts of the doctrine remain, and the plaintiff "cannot be permitted to do indirectly what he no longer can do directly." *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Further, a plaintiff cannot bring a federal claim in lieu of a state court appeal that is inextricably intertwined with the state court judgment. Yet, the Sixth Circuit erroneously concluded that the federal court had subject-matter jurisdiction.

If the Sixth Circuit's abolition of the *Rooker-Feldman* doctrine remains enforceable, there will be no viable safeguards throughout the Sixth Circuit states to guard against the federal court essentially overruling valid state court

judgments and state law. In the instant case, for example, the Ohio court approved the garnishment affidavit because, in its opinion, the affidavit complied with Ohio statutory law. The Ohio court entered a garnishment order. The federal court's decision, allowing the plaintiff to seek damages against the affiant arising from the state court garnishment order, permits, without restriction, the federal court to impose additional requirements on Ohio statutory law and to preempt state court law.

The result of the federal court's intervention permits the federal courts seemingly unlimited jurisdiction to interpret the function of the Ohio garnishment affidavit under the terms and policies of the FDCPA, notwithstanding the state court's determination that this function is solely within the discretion of the state courts. The FDCPA is not the proper vehicle to redress what is essentially the plaintiff's constitutional challenge to the Ohio statute. If the federal FDCPA action is permitted to proceed, the result will be to permit the court to impose probable cause standards on the postjudgment affidavit required for garnishment proceedings. The Ohio statute does not require probable cause, because the affidavit is prepared *after* the judgment on the debt. An attorney filing a garnishment affidavit is recovering on a judicially determined debt. If the Ohio state legislature is concerned about the role of probable cause in postjudgment affidavits, the state legislature can address and deliberate any modifications to the state laws in the proper forum. It is well established, however, that for constitutional purposes, the taking of a debtor's property is accomplished by the underlying judgment, which the defendant successfully obtained in the instant case. *See Agg v. Flannagan*, 855 F.2d 336, 343 (6th Cir. 1988).

Furthermore, Congress was unequivocal that the FDCPA was not intended to interfere with state laws. Indeed, the federal statute specifically states that it "does not annul,

alter, or affect, or exempt any person subject to the provision of this title [15 U.S.C. §§ 1692 et seq.] from complying with the laws of any state with respect to debt collection practices." 15 U.S.C. § 1692n. The idea that a dissatisfied state court plaintiff can refile his or her claim in federal court under the FDCPA to effectively override a state court procedure pursuant to state law contradicts the fundamental policies of the federal statute.

Under our federalist system of government, the federal courts do not and should not have jurisdiction to modify state statutes. Yet, if the Sixth Circuit's interpretation of federal subject-matter jurisdiction is not reversed, the line between state and federal jurisdiction is severely blurred or, at the very least, confusing and unreliable. Under either interpretation, it is reasonably foreseeable that dissatisfied state court litigants will take advantage of the confusion and seek federal court intervention and remedies where they did not exist before. By interpreting and ruling on state laws through the screen of separate federal statutes, federal courts will continue to redefine and supersede state laws, and litigants will happily end run around unsatisfactory state statutes and state judges' rulings.

By overruling the *Rooker-Feldman* doctrine, the Sixth Circuit's decision is particularly alarming to creditors' attorneys, including the membership of the Ohio Creditor's Attorneys Association. By permitting plaintiffs to use the FDCPA in federal court actions, no matter how intertwined the claims are with the underlying state court action, so as to impose additional requirements and meaning on state procedures for collecting on judgments, creditors' attorneys will no longer have any guidance or structure in this area of the law. Attorneys can no longer reasonably rely on state law procedures for basic collection matters if they are constantly concerned that their actions will be analyzed under a different set of federal statutes which have their own policy considerations. Furthermore, creditors' attorneys cannot

reasonably rely on the legislative system in place for amending state legislation if the federal courts, rather than the state legislature, are involved in modifying state law requirements.

As with the Sixth Circuit's abolishment of the absolute witness immunity rule, the Sixth Circuit's overruling of the *Rooker-Feldman* doctrine will result in confusion, uncertainty, and substantial exposure to litigation for attorneys. The chilling effect will mean, contrary to the Sixth Circuit's seemingly indifferent attitude, that not only creditors' attorneys, but attorneys in other disciplines as well, will be reluctant to take on or zealously represent clients in creditors' rights cases or in other cases potentially involving federal claims under any broad federal consumer protection or commercial statute.

This case offers the Court the opportunity to reestablish the absolute witness immunity rule and to articulate for future challenges the scope of the rule and, if there are exceptions to the rule, what those exceptions are and why. Additionally, the case offers the Court an opportunity to further define the boundaries of the *Rooker-Feldman* doctrine and federal subject-matter jurisdiction. If the Sixth Circuit decision is not addressed, confusion over the role of the federal courts, particularly in how subject-matter jurisdiction can be manipulated to modify and change state law, will persist and lead to additional costly and unproductive litigation.

If there is legitimate concern about the practices of creditors' attorneys, which has not been demonstrated in this litigation despite extensive briefing and argument, the state or federal legislature, not the federal courts, is the appropriate body to address such concerns. The legislative bodies are equipped to investigate concerns and propose legislation or propose modifications to existing legislation. It is well known

that in other areas of practice, such as securities and accounting law, the practice of attorneys is being scrutinized, but through a systematic and thorough analysis of the issues and concerns, not through piecemeal and inconsistent judicial activism. *See* Lewis D. Lowenfels et al., *Attorneys as Gatekeepers: SEC Actions Against Lawyers in the Age of Sarbanes-Oxley*, 37 U. Tol. L. Rev. 877 (Summer 2006). Even in areas where governmental agencies have a strong interest in securing their needs, such as attempting to access confidential information from attorneys whose clients are being investigated, agencies understand the chilling effect their interests have on attorney-client relations and work product, and they are working with attorney professional organizations to address the conflicting needs. For example, the American Bar Association's Task Force is actively addressing the pressure placed on attorneys and their clients by government agencies in their effort to safeguard privileges that serve important societal interests. *See Report of the American Bar Association Task Force on the Attorney-Client Privilege*, SL 096 ALI-ABA 101 (Aug. 2005). It would be unprecedented for a federal court, such as the Sixth Circuit in the instant case, to unilaterally proceed in areas which impact on our federalist system and which will undoubtedly have a chilling effect on attorney-client relations.

The Court should grant the Petition for Writ of Certiorari to maintain the integrity of the judicial system against the challenges imposed by the Sixth Circuit's erroneous decision in this case and the resulting harm and confusion the Sixth Circuit's decision will cause.

CONCLUSION

We urge this Court to grant Weltman, Weinberg & Reis Co., LPA's Petition for Writ of Certiorari and by its review, to direct the Sixth Circuit Court of Appeals to correct its erroneous interpretation and application of the absolute witness immunity rule and the overruling of the *Rooker-Feldman* doctrine to prevent what would result in a dramatic and ill-advised increase in federal court litigation by litigants who want a second bite of the apple without restraint and who desire a means by which to modify state regulations through federal judicial activism rather than legislative procedure.

Respectfully submitted,

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